84-1601

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,

Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,

Appellees.

On Appeal From the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

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*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Of Counsel:

PETER V. SINTZ
WILLIAM M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, but which imposes no corresponding burden on an unsuccessful plaintiff-appellant, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether appellant's right to a fair, unbiased hearing of its appeal below, guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, was denied because of the participation in the consideration and decision of this case, an action for bad faith failure to pay an insurance claim, by a Justice of the Supreme Court of Alabama who, while this case was *sub judice* in the Supreme Court of Alabama and without any notice to the parties to this case, filed and continued to prosecute a civil class action seeking punitive damages against an insurer based on alleged bad faith failure to pay insurance claims, and who also filed a similar action while this case was *sub judice* in the Supreme Court of Alabama against another insurer, where several issues raised in and central to the litigation filed by that Justice are, or predictably will be, directly controlled by rulings of law rendered by the Supreme Court of Alabama in its judgment and opinion issued in this case.

3. Whether the subjection of appellant to punitive damages for conduct occurring in 1977 and 1978 in connection with the performance of appellant's contractual obligations violates the Contract Clause, Art I, § 10, cl. 1 of the Constitution of the United States, because it retroactively imposes a new, unanticipated and severe obligation on the contract between appellant and appellees, an obligation in the form of a cause of action which was not recognized by Alabama until 1981 and which has itself undergone substantial modification to appellant's detriment since 1981, particularly by the judgment and opinion in this case.

4. Whether the award of $3,500,000 in punitive damages against appellant is violative of the Excessive Fine Clause of the Eighth Amendment of the Constitution of the United

States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment because it is vastly out of proportion to actual damages, equally out of scale with any penalties for illicit business conduct prescribed by the Alabama legislature, and constitutes an arbitrary and capricious taking of appellant's property unjustified by any rational state purpose.*

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* All parties to this case are named in the caption. Appellant Aetna Life Insurance Company is a wholly owned subsidiary of Aetna Life & Casualty Company. Appellant Aetna Life Insurance Company has an interest in, but does not wholly own, the following subsidiaries:

CS Development Corporation, East Cactus Plaza Associates, Friday Associates, Koll Center Newport A, Koll Center Newport Number 14, St. Vincents Mall, Village Plaza Associates, Koll Center Newport Number 15, Koll Center Newport Number 8, Koll Center Newport Number 9, Koll Center Newport Number 10, Koll Center Newport Number 11, North Park Plaza Associates, Catalina Plaza, Thace Associates, Lincoln Benicia V, VI & VII Associates, Corporate Center Pasadena Associates, Ensenada De Las Colinas I Associates, Cordova Del-Mar Associates, Hayward Industrial Park Associates V, Tri-City Mall Associates, Aetna Life Insurance Company, Second & Main Associates, Biltmore Fashion Park Associates, Lincoln Center Associates, Chris-Town Village Associates, 1800 West Loop Tower Associates, Edina Office Center Joint Venture, Empire Park Associates, Empire Park IV Associates, Golden State Associates, Hillcrest Associates, Kemble Associates, Lincoln Benicia IV Associates, Meridian Associates, Silverada Mall, Tri Freeways Associates, Tatum Associates, Washington Plaza, Westwood Mall Associates, 1670 Broadway Joint Venture, San Jose V Associates, O'Hare Center Venture, Lincoln Oakland Coliseum I & II Associates, Lincoln San Jose VI Associates, RBA II Associates, Southwest Financial Plaza Annex, Northwest Associates, Royal Commerce Centre Associates, Hayward Industrial Park Associates III, Southwest Financial Plaza, Hayward Industrial Park Associates I, Hayward Industrial Park Associates IV.

Appellant has no other parent company, subsidiary or affiliate within the meaning of Rule 28.1 of the Rules of this Court.

The caption on the December 7, 1984 opinion of the court below, naming Aetna Life & Casualty Co., Inc., as the appellant, should have been corrected by the court below pursuant to its prior grant, on August 29, 1983, of appellant's motion to make that correction as to all papers in that case by naming Aetna Life Insurance Co. as the correct appellant-defendant. Subsequent to the decision below, appellant filed a second motion to ensure that the court below corrects this oversight.

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JURISDICTIONAL STATEMENT

Aetna Life Insurance Co., the appellant, appeals from the final decision of the Supreme Court of Alabama dated December 7, 1984, affirming the judgment of $3,501,650.22 against it by the Circuit Court of Mobile County, the order of the Supreme Court of Alabama dated March 8, 1985, overruling appellant's Application for Rehearing of that December 7, 1984 decision and denying appellant's Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984 and for Hearing De Novo, and the order of that court dated March 25, 1985 denying appellant's Motion to Suspend Rules for the purpose of filing a Second Application for Rehearing. Under this decision and these orders, appellant's right to a fair, unbiased hearing of its appeal guaranteed by the Due Process Clause of the Fourteenth Amndment, as well as appellant's substantive rights under the Contract Clause, the Due Process Clause of the Fourteenth Amendment, and the Excessive Fine Clause of the Eighth Amendment, as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, have been denied. Moreover, § 12-22-72, *Code of Alabama* (1975), under which an automatic penalty of ten percent of the $3,501,650.22 judgment was imposed on appellant upon entry of the December 7, 1984 decision affirming that judgment, has been upheld against appellant's claim that that statute on its face and as applied violates appellant's rights under the Equal Protection Clause of the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of December 7, 1984 is reproduced in App. A, *infra*, 1a-63a, and is unofficially reported in 19 Ala. Bar Rep. 272. The orders, with opinions concurring specially, of the Supreme Court of Alabama of March 8, 1985 are reproduced in App. B, *infra*, 64a-73a, and are unreported. The order of the Supreme Court of Alabama of March 25, 1985 is reproduced in App. C, *infra*, 74a-75a, and is unreported. The prior

opinions of the Supreme Court of Alabama in this case are reported *sub nom. Lavoie* v. *Aetna Life & Casualty Co.*, 374 So.2d 310 (Ala. 1979), and 405 So.2d 17 (Ala. 1981). The Circuit Court of Mobile County issued no opinion.

JURISDICTION

The December 7, 1984 decision and March 8 and 25, 1985 orders of the Supreme Court of Alabama necessarily upheld, *sub silentio*, § 12-22-72, *Code of Alabama* (1975), against appellant's claim, under the Equal Protection Clause of the Fourteenth Amendment, that § 12-22-72 is unconstitutional. Because the judgment and order, App. D, *infra*, 76a, assessing a ten percent penalty against appellant pursuant to this statute was compelled by the December 7, 1984 decision of the Supreme Court of Alabama and was therefore not part of any appealable judgment until that time, appellant's federal constitutional challenge to § 12-22-72 was, pursuant to an unbroken line of sixteen cases decided over a 67-year period by the Supreme Court of Alabama, presented in appellant's Brief and Request for Oral Argument attached to its Application for Rehearing, App. E, *infra*, 81a. A Notice of Appeal of this case to this Court was filed in the court below on March 25, 1985 after appellant had received notice of that court's order in this case of that same date. App. H, *infra*, 282a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Questions 2, 3 and 4 were duly presented to the Supreme Court of Alabama and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the overruling, on March 8, 1985, of appellant's Application for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Contract Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

3. The Excessive Fine Clause of the Eighth Amendment of the Constitution, provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

4. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

5. Section 12-22-72, *Code of Alabama* (1975), provides, in pertinent part, that:

> "When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . ."

STATEMENT OF THE CASE

Appellant is before this Court seeking plenary consideration of its contentions that a judgment of $3,501,650.22, including $1,650.22 compensatory damages and $3,500,000 punitive damages, and the $350,165 penalty automatically adjudged on that judgment under § 12-22-72, *Code of Alabama* (1975), have deprived appellant of substantial rights guaranteed by the specific provisions of the Constitution of the United States enumerated above. The constitutional issues presented in Questions 1, 3 and 4 are substantial and in several respects present issues of first impression in this Court.

Appellant recognizes, however, that its constitutional challenge in Question 2 to the fitness of a Justice of the Supreme Court of Alabama to participate in the consideration and decision of this case, as well as the absence of any express determination by the court below of any of the four

federal questions brought to this Court, may tend to divert this Court's attention at this stage of this case, from the substantial federal questions appellant would have preferred to have brought to this Court after a full and constitutionally fair hearing of both the federal constitutional and state law issues in its case by the court below. Therefore, appellant will proceed by first setting forth as briefly as possible those facts pertinent to the constitutional and jurisdictional issues presented by this case, after which the issues of jurisdiction and substantiality will be discussed.

A. Facts Relevant to the Constitutional Questions Presented

In 1977, appellees were insured beneficiaries of a group policy of health and medical insurance issued by appellant to the City of Mobile. On February 3, 1977, appellee Margaret W. Lavoie was admitted to Mobile Infirmary Hospital from which she was discharged 23 days later. App. A, *infra,* 2a-3a.

On June 3, 1977, appellant paid to the appellees, the attending physician and the Infirmary a total of $1,579.74 on a total claim of $3,028.25. Appellant declined to pay for other charges, stipulated to be $1,650.22, App. A, *infra,* 6a, on the basis of the assessment (later rejected by the trial court) that the latter amount was incurred for "care, treatment, services or supplies which are not necessary for the treatment of the . . . disease concerned . . . ." and therefore was not within its contractual obligation to appellees. App. A, *infra,* 11a. On November 14, 1977, December 23, 1977 and August 3, 1978 appellant again declined to pay the outstanding balance of the claim. App. A, *infra,* 8a-10a. At all relevant times through August 3, 1978, Alabama did not recognize a cause of action for bad faith failure to pay an insurance claim in the first party context.

Fully consistent with the state of the pertinent law in Alabama at the time, the circuit court initially dismissed appellees' civil action for failure to state a claim for relief pursuant to Rule 12(b)(6) of the Alabama Rules of Civil Procedure. *Lavoie* v. *Aetna Life & Casualty Co.,* 374 So.2d 310, 310-11 (Ala. 1979). The Supreme Court of Alabama

reversed on August 31, 1979, stating that it had "neither accepted nor rejected" a theory of recovery based on "bad faith refusal of the insurer to pay legitimate benefits due under a policy of insurance." *Id.*, at 311.

On October 2, 1981, the Supreme Court of Alabama held, for the first time, that a cause of action for bad faith failure to pay an insurance claim existed in Alabama. *Chavers* v. *National Security Fire & Casualty Co.*, 405 So.2d 1 (Ala. 1981). As stated by the dissenting Justice in that case, "Today the Court . . . introduces you to Mr. Bad Faith." *Id.*, at 15 (Almon, J. dissenting).

That same day, the Supreme Court of Alabama reversed the circuit court's decision granting summary judgment for appellant on the two bad faith counts in this case, *Lavoie* v. *Aetna Life & Casualty Co.*, 405 So. 2d 17 (1981), and remanded the case to the circuit court "in light of" its "recent decision . . . recogniz[ing] the intentional tort of bad faith in first party insurance actions." *Id.*, at 18.

In yet another case handed down on October 2, 1981, the Supreme Court of Alabama decided that under the newly recognized tort of bad faith, punitive damages would be recoverable. *Gulf Atlantic Life Insurance Co.* v. *Barnes*, 405 So.2d 916, 925 (Ala. 1981).

In 1982, this "Dr. Frankenstein's monster," *Chavers* v. *National Security Fire & Casualty Co.*, 405 So.2d, at 14 (Almon, J., dissenting), took on additional form when the Supreme Court of Alabama held that, as a general rule, a bad faith claim would not be recognized unless the plaintiff is "entitled to recover on the contract claim *as a matter of law.*" *National Savings Life Insurance Co.* v. *Dutton*, 419 So.2d 1357, 1362 (Ala. 1982) (emphasis added). That same year, the court also reaffirmed its view that, as a general matter, partial payment of a claim, as occurred in this case, would take "away the issue of bad faith refusal to pay." *National Security Fire & Casualty Co.* v. *Bowen*, 417 So.2d 179, 186 (Ala. 1982). *See also Sexton* v. *Liberty National Life Insurance Co.*, 405 So.2d 18 (1981).

On November 4, 1982, the jury returned with a verdict against appellant in the amount of $3,501,650.22, of which

$3,500,000 was for punitive damages. On September 8, 1983 appellant filed its opening brief in the Supreme Court of Alabama.[1] On November 17, 1983, the request of appellant and appellees for oral argument was denied by the court below and the case was submitted to a division of the court.

On November 23, 1983 Justice T. Eric Embry of the Supreme Court of Alabama gave notice to the Maryland Casualty Company of the loss of a valuable mink coat from his home, the loss of which he alleged to be covered by an insurance policy written by that company. App. F, *infra*, 90a. In a civil action against Maryland Casualty Co. filed by Justice Embry on January 19, 1984, Justice Embry alleged that the defendant insurance company "in bad faith, willfully, intentionally, and/or maliciously failed to pay a valid claim" and prayed for "punitive damages." App. F, *infra*, 91a.

On January 30, 1984, Justice Embry filed a civil action on behalf of himself and as representative of a class of all other Alabama state employees insured under a group plan by Blue Cross-Blue Shield of Alabama ("Blue Cross") alleging, *inter alia*, a failure of Blue Cross to pay in full various claims for him and his late wife, a custom of paying in claims only a portion of the actual charges, unreasonable delay in paying claims, and a "conscious, willful and intentional and fraudulent plan or scheme [to withhold] payment of valid claims for unreasonable lengths of time and in so doing, [to] unlawfully enrich . . . itself . . . ." (App. F, *infra*, 98a. The complaint alleged bad faith and sought punitive damages. App. F, *infra*, 102a.

On April 4, 1984, the court below set aside its previous denial of the requests for oral argument in this case and set the case for oral argument. On May 14, 1984 the pending case was argued and submitted to the full court.

On December 7, 1984, Justice Embry, despite his ongoing involvement in the lawsuit against Blue Cross (his suit

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[1] A copy of the docket entries in this case in the court below is being lodged with the Clerk of this Court simultaneously with the docketing of this appeal.

against the Maryland Casualty Co. having settled, App. F, *infra*, 85a), participated as the fifth Justice necessary to the majority position in the 5-4 affirmance of the $3,501,650.22 judgment against appellant. In the per curiam opinion joined by Justice Embry and four other Justices, the court below, for the first time in any bad faith case, renounced its 1982 position in *Dutton* and held inapplicable its own general rule that a plaintiff must be entitled to judgment as a matter of law on the contract claim in order for a bad faith action to go to a jury, App. A, *infra*, 25a-31a. Also for the first time, and contrary to its 1981 position in *Sexton* as reaffirmed in 1982 in *Bowen*, the Supreme Court of Alabama held inapplicable the general rule that partial payment would defeat a bad faith claim, App. A, *infra*, 32a-33a. On December 21, 1984 appellant filed a timely Application for Rehearing.

On January 10, 1985, while appellant's Application for Rehearing in this case was *sub iudice* in the court below, Justice Embry was deposed by Blue Cross. App. G, *infra*, 145a. In that deposition, Justice Embry, *inter alia*: (1) acknowledged his authorship of the December 7, 1984 per curiam opinion in this case, App. G, *infra*, 169a; (2) discussed facts regarding the internal deliberations of the court below in this case, App. G, *infra*, 166a-170a; (3) discussed his involvement in development and prosecution of his case against Blue Cross at the same time he was drafting the opinion in this case, App. G, *infra*, 206a-207a, 228a; and (4) made statements regarding his personal experiences over many years with alleged non-payment, partial, and late payment of health insurance and other insurance claims. App. G, *infra*, 173a *et seq.*

On February 14, 1985 appellant first learned of Justice Embry's pending suit against Blue Cross, and on February 21, 1985 appellant filed two motions raising its disqualification challenge in the court below. App. F, *infra*, 85a. On March 8, 1985 Justice Embry participated in the denial of appellant's two disqualification motions and its Application for Rehearing. App. B, *infra*, 64a-65a. On March 20, 1985 appellant received a copy of the January 10, 1985 deposition

and on March 22 moved once again for his disqualification, App. G, *infra,* 132a. On March 25, 1985, Justice Embry participated in the denial of appellant's motion. App. C, *infra,* 75a.

B. The Federal Questions Were Properly Presented

This Court has recently had occasion to restate the familiar rule that it will not normally assume jurisdiction over a case and consider a federal question presented by that case unless that federal question "had been *either* raised or squarely considered and resolved in state court." *Illinois* v. *Gates,* 462 U.S. 213, 218 n.1 (1983). Because the four federal questions presented by appellant in this appeal were not *expressly* "considerely and resolved" by the court below, appellant recognizes that it has the burden of persuading this Court that it has jurisdiction over this appeal and that there is no jurisdictional or prudential bar to this Court's deciding each of the four questions presented.

The orders of the court below denying appellant's motions regarding the disqualification question facially preclude a determination that appellant's constitutional challenge to Justice Embry's fitness (Question 2) could have been denied on an independent and adequate state ground. Thus, the discussion of the presentation of that issue requires no explication of appellate practice in Alabama. For that reason, appellant will address the presentation of Question 2 first even though the disposition of Question 2 by the court below lies, as a technical matter, within this Court's *certiorari* jurisdiction under 28 U.S.C. § 1257 (3) rather than this Court's appellate jurisdiction under 28 U.S.C. § 1257(2). *See* 28 U.S.C. § 2103. Appellant will then discuss the presentation of Questions 1, 3 and 4 in the fuller context of the relevant Alabama practice.

1. Presentation of the Disqualification Issue

Question 2 regarding the disqualification of Justice Embry and appellant's demand under the Due Process Clause for hearing de novo of its case was undoubtedly presented properly to the Supreme Court of Alabama. On or about

February 14, 1985 while appellant's case was pending before that court, appellant learned that Justice Embry had filed and was still prosecuting a class action for bad faith failure to pay insurance claims against Blue Cross. App. F, *infra*, 86a. After a brief but necessary factual inquiry, on February 21, 1985 appellant filed in the Supreme Court of Alabama its two disqualification motions. Appellant's challenge was also directed to the other eight Justices of the court below on the basis of appellant's assumption (confirmed, at least in part, by the opinions specially concurring in the March 8, 1985 order) that each Justice was probably insured under the same Blue Cross contract and each was therefore probably a member of the putative class which Justice Embry sought to represent.[2]

Paragraphs 8, 9 and 10 of appellant's February 21, 1985 motions clearly stated that appellant was asserting, *inter alia*, rights under the "Due Process Clause of the Fourteenth Amendment of the Federal Constitution," App. F, *infra*, 87a, and that Justice Embry's participation in the consideration and decision of this case violated appellant's federal due process rights and required a hearing de novo of appellant's case after appointment of a qualified court pursuant to § 12-2-14, *Code of Alabama* (1975).[3] App. F,

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[2] Appellant does not bring to this Court the question whether the membership of the eight other Justices of the Supreme Court of Alabama in the putative class in Justice Embry's civil action against Blue Cross is or was, in and of itself, sufficient to disqualify those Justices under the Due Process Clause of the Fourteenth Amendment from future participation in this case on remand from any judgment of this Court. As indicated by the opinions issued by Chief Justice Torbert and Justice Maddox specially concurring in denial of appellant's February 21, 1985 motions related to disqualification. App. B, *infra*, 66a (Torbert, C.J., specially concurring), 69a (Maddox, J., specially concurring), both of those Justices took action to withdraw as members of that putative class, and appellant is prepared to assume that the remaining Justices will also withdraw in due course if further proceedings in the court below are required by this Court's ultimate disposition of this case.

[3] Under this statute, the Governor of Alabama is authorized specially to appoint temporary Justices to the Supreme Court of Alabama from the membership of the state bar in cases in which the disqualification of

(footnote continued)

infra, 88a. Appellant's February 21 Motions and its Application for Rehearing were denied on March 8, 1985. App. B, *infra*, 64a.

On March 20, 1985, appellant obtained for the first time a copy of the transcript of Justice Embry's January 10, 1985 deposition. App. G, *infra*, 133a. That deposition contained previously unobtainable information regarding Justice Embry's qualifications to hear and decide appellant's case. On March 22, 1985 appellant renewed its challenge to Justice Embry's qualifications in its Motion to Suspend Rules, placing the transcript of Justice Embry's deposition before the court and giving that court a second opportunity to pass on that question.

As reflected in the March 8, 1985 order, per curiam opinion, and opinions specially concurring in that order, App. B, *infra*, 64a-73a, each and every Justice of the court below clearly decided appellant's challenge to his or her individual fitness to sit in this case. These "individual" decisions on the merits necessarily preclude the argument that this federal constitutional challenge was disposed of on an independent and adequate state ground. That per curiam opinion stated:

> "The Court is of the opinion that under the allegation of said motion in this case each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each justice having voted not to recuse, IT IS THEREFORE, ORDERED that the [appellant's motions] be . . . denied."

App. B, *infra*, 64a.

It is indisputable on the face of this terse order and opinion that "the Court" reached and decided a procedural aspect of appellant's disqualification challenge, *i.e.*, whether an individual Justice should or would pass on the qualifications of the other individual Justices to hear and decide this case, and a substantive issue, *i.e.*, that each of

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one or more Justice(s) leaves an even number (six or eight) of Justices available to hear and decide a case and there is an equal division among them or the number of available Justices is reduced below six.

the five Justices who joined this per curiam opinion also individually determined himself or herself not to be disqualified. Therefore, Question 2 is properly before this Court.

Even if the federal constitutional question is assumed not to have been decided by the court below, under this Court's cases, refusal by a state court to *decide* a properly presented federal question which was necessary to the state court's disposition of the case before it, *see generally NAACP* v. *Alabama*, 377 U.S. 288 (1964), is similar in effect to a state court's silence on a federal question; neither operates to defeat this Court's jurisdiction. As Chief Justice Marshall expressed this principle, all that is required is that "the record should show a complete title under the [federal law invoked], and that the judgment of the [state] court is in violation" of that federal law. *Hickie* v. *Starkie*, 26 U.S. (1 Pet.) 72, 75 (1828); *Illinois* v. *Gates*, 462 U.S., at 220 n.2. Thus, the denial of appellant's disqualification motions had the legal effect of denying appellant's asserted rights under the Due Process Clause of the Fourteenth Amendment, and the curious manner in which the court below disposed of those motions has no affect on this Court's jurisdiction over this case and its power to decide Question 2. *See generally New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67-68 (1928).

2. Presentation of the Federal Constitutional Challenge to § 12-22-72, *Code of Alabama* (1975)

Question 1 involving the facial unconstitutionality of § 12-22-72, *Code of Alabama* (1975), was presented for the first time in appellant's Brief filed with its Application for Rehearing.[4] App. E, *infra*. 81a. This was the logical time for appellant to present its challenge to § 12-22-72's con-

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[4] Under Rule 20, Ala. R. App. P., "Assignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient." This Court has expressly relied upon presentation in briefs before the Supreme Court of Alabama

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stitutionality, since the non-discretionary imposition by the court below of the ten percent penalty on the $3,501,650.22 judgment was not at issue or reduced to any appealable order until that judgment was affirmed.

Appellant's challenge to § 12-22-72 was properly and timely presented in complete conformity with relevant decisions of the Supreme Court of Alabama—a line of at least sixteen cases dating from 1918, in which the federal constitutionality of, or questions regarding the construction of, § 12-22-72 have been drawn into question. In one such case, § 12-22-72 was challenged under the Equal Protection Clause for the first time in an Application for Rehearing in the Supreme Court of Alabama. Without any suggestion that raising the issue at that stage was in any way improper or inconsistent with Alabama practice, the Supreme Court of Alabama, consistent with its routine practice,[5] entertained (and rejected) the federal constitutional challenge to § 12-22-72 on the merits. *Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1979). In light of this longstanding and consistent practice, the action of the court below in overruling appellant's Application for Rehearing without any opinion must be deemed by this Court as having implicitly upheld the con-

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in finding that a federal question was properly presented. *NAACP* v. *Alabama*, 377 U.S. 288, 293 n.4 (1964).

[5] The Supreme Court of Alabama has routinely permitted constitutional and statutory questions regarding § 12-22-72 to be raised in an Application for Rehearing or an equivalent post-judgment motion. *See Brown Mech. Contractors, Inc.* v. *Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A.* v. *Martin*, 425 So.2d 415 (Ala. 1983); *Chapman* v. *Rivers Constr. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy* v. *McLendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co.* v. *Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson* v. *Gains*, 264 Ala. 184, 85 So.2d 893 (1956); *Lloyd* v. *Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress* v. *Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham* v. *Bowen*, 254 Ala. 41, 47 So.2d 174 (1950); *Atlanta, Birmingham & Coast R. Co.* v. *Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter* v. *Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings* v. *Builders' Supply Co.*, 229 Ala. 1, 155 So.

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stitutionality of § 12-22-72; that action was presumptively not based on lack of proper presentation of this question.[6]

3. Presentation of Questions 3 and 4

Question 4 was presented for the first time in appellant's Brief in support of its Application for Rehearing by express reference to the Excessive Fine Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. App. E, *infra*, 79a-80a. This question was also brought before the court below in appellant's disqualification motions filed February 21, 1985, App. F, *infra*, 87a, and March 22, 1985, App. G, *infra*, 272a.

Question 3 was also presented in the Brief in support of appellant's Application for Rehearing. App. E, *infra*, 79a-80a. Although the Contract Clause was not specifically cited until the filing of appellant's motions of February 21, 1985, App. F, *infra*, 87a, the substantive argument made on February 21 is indistinguishable from the Brief's constitutional challenge to the $3,500,000 award based on retroactive application of new legal rules and therefore was nothing more than "an enlargement of the one mentioned" in its Brief in support of its Application for Rehearing and may be viewed as "so connected with it in substance as to form but another ground or reason for alleging the invalidity" of the December 7, 1984 judgment. *Dewey* v. *Des Moines*, 173 U.S. 193, 197-98 (1899). *See generally Illinois* v. *Gates*, 462 U.S., at 219-20; *id.*, at 248-50 (White, J., concurring in the judgment); *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972).

On the extraordinary facts of this case, appellant's assertion of these two federal constitutional questions after

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858 (1934); *Dent* v. *Foy*, 210 Ala. 160, 97 So. 627 (1923); *Montgomery Light & Water Power Co.* v. *Thombs*, 204 Ala. 678, 87 So. 205 (1920); *New York Life Ins. Co.* v. *Reese*, 201 Ala. 673, 79 So. 245 (1918).

[6] The only rule of appellate procedure directly relevant to appellant's challenge to the constitutionality of § 12-22-72 is Rule 44, Ala. R. App. P., which requires that the Attorney General of Alabama be served with a copy of the "written brief" raising the constitutional challenge. Appellant complied with this Rule. App. E, *infra*, 84a.

the December 7, 1984 decision of the Supreme Court of Alabama was and is justified on five separate grounds. Before setting forth these five grounds, appellant will first discuss two more general aspects of the proper presentation question.

a. The Presentation of Questions 3 and 4 Raises Only Prudential Concerns

This Court's decisions addressing the question of proper presentation of federal questions to state courts for purposes of this Court's subsequent consideration of such federal questions has left unclear whether and when the rules formulated by this Court are jurisdictional, as opposed to prudential. Appellant submits that once this Court has jurisdiction over a case because one federal question has been properly presented to, or decided by, the state court below, then this Court's *power* to decide other federal questions in that case cannot be subject to serious question. The jurisdictional statutes applicable to this case, 28 U.S.C. § 1257(2) & (3), confer jurisdiction over "[f]inal judgments or decrees" where the validity of "*a* statute" has been drawn into question or where "*any* title, right, privilege or immunity is specially set up or claimed . . . ." (emphasis added).

Consistent with the plain language of the relevant statutes, this Court's classic formulation is that dismissal of an appeal is required in the "total absence . . . of *any* question . . . which would give this court jurisdiction." *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 240, 263 (1836) (emphasis added). Appellant submits that this Court, because it has jurisdiction over cases, not questions, has clear jurisdiction over this case based upon Questions 1 and 2 and that its consideration and decision of Questions 3 and 4 should be viewed, analytically, as raising only prudential considerations.

b. Alabama's Rules Did Not Preclude Presentation After the Court's December 7, 1984 Decision

Neither the Alabama Rules of Civil Procedure nor the Alabama Rules of Appellate Procedure facially precluded

the presentation of Questions 3 or 4 after the announcement of the December 7, 1984 opinion, nor did those rules preclude the court below from reaching and deciding these questions when they were presented.

No rule of the Alabama Rules of Civil Procedure *expressly* addresses the issue of presentation of federal, or even state, *constitutional* questions in the trial court. In contrast to review by the Supreme Court of Alabama by certiorari of decisions of Alabama's intermediate appellate courts, Rule 39, Ala. R. App. P., under which the intermediate appellate court must have overruled an application for rehearing on the point on which further discretionary review on certiorari is sought, there is no comparable rule governing appeals of right from the circuit (trial) courts. It is also clear that the court below does, as a matter of its own practice, entertain and decide constitutional questions raised for the first time in an Application for Rehearing. *See, e.g., Central of Georgia Railway Co.* v. *Steed*. 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1971). And, notwithstanding the fact that the court below has stated from time to time that "it is well established that where a constitutional question was not raised on trial it will not be considered on appeal . . . ," *City of Montgomery* v. *Robinson*, 441 So.2d 857, 861 (Ala. 1983), the court's practice has been to proceed to rule on such questions. *Id. See King* v. *Reid*, 428 So.2d 611, 615 (Ala. 1983); *Ex parte Hanna*, 267 Ala. 527, 103 So.2d 720 (1958).

Thus, under these circumstances an express ruling by the court below denying appellant's Application for Rehearing on procedural grounds would not have extinguished this Court's power to decide these federal constitutional questions under this Court's decision in *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964), which requires that procedural barriers to consideration of federal questions be "strictly or regularly followed" in order to deprive this Court of power to review substantial federal constitutional questions. There was, of course, no such express ruling below.

c. Prudential Considerations

Because there is no independent and adequate state ground for the denial of appellant's Application for Rehearing, appellant need only convince this Court that there are no additional prudential barriers to its consideration of Questions 3 and 4. None of the prudential considerations discussed in this Court's recent decision in *Illinois* v. *Gates* are preclusive here.

First, if this Court's ultimate decision on Question 2 were in appellant's favor, then, *a fortiorari,* appellant would never have had "a reasonable opportunity to have the issue[s] as to the claimed right[s] heard and determined" by the Supreme Court of Alabama. *See Central Union Tel. Co.* v. *Edwardsville,* 269 U.S. 190, 194-95 (1925). In such circumstances, there would be ample precedent for this Court's proceeding to the merits of Questions 3 and 4. *See, e.g., NAACP* v. *Alabama,* 377 U.S., at 302. especially since Justice Embry's disqualification would bring into play the provisions of § 12-2-14, *Code of Alabama* (1975), resulting in the appointment of one or more temporary Justices to hear this case. In such circumstances, there is nothing to be said, either as a matter of comity or judicial economy, for remanding these important federal constitutional questions for decision on the merits by a court with one or more provisional members.

Second, appellant could not reasonably have been expected to anticipate that the Supreme Court of Alabama would so dramatically affect its constitutional rights by substantially modifying, by the margin of a single, highly interested vote, at least two relatively firm and recently established substantive standards governing the award of punitive damages in Alabama. *See Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U.S. 673, 677-78 (1930). Appellant, in its Brief in support of its Application for Rehearing, specifically brought to the attention of the court below these two substantial modifications in the legal rules governing the tort of bad faith failure to pay an insurance claim. App. E, *infra,* 79a-80a. Thus, appellant's presentation of its Contract Clause claim in its Application of Rehearing was

appropriate both under *Brinkenhoff-Faris* and because the court below has a practice of entertaining constitutional questions which arise as a result of its own decision in a case, as in *Central of Georgia Railway Co.* v. *Steed, supra.*

Furthermore, it is apparent from the face of the per curiam opinion below that the $3,500,000 punitive damage award challenged in Questions 3 and 4 was based, at least in part, on the totally unexpected and unwarranted purported "findings" in the per curiam opinion that appellant was guilty of "fraudulent" conduct, App. A, *infra,* 22a, 35a, 36a & 37a, notwithstanding the fact that a fraud count brought by appellees had been withdrawn prior to trial. Similarly, the per curiam opinion contains an equally unexpected and unwarranted purported "finding" that appellant had been engaged in a "conspiracy," App. A, *infra,* 33a, 35a, even though conspiracy counts had likewise been brought by appellees but had been withdrawn at the close of the appellees' case.[7] Under the circumstances, appellant could not reasonably have anticipated that such "findings" would be used against it by the court below. Thus, appellant's constitutional challenges to the $3,500,000 punitive damages award are timely under this Court's decision in *Saunders* v. *Shaw,* 244 U.S. 317 (1917).

Third, in a case in which this Court has clear appellate jurisdiction over one question and equally clear jurisdiction over a substantial constitutional challenge to the fairness of the hearing in the court below, "due regard for the appropriate relationship of this Court to state courts." *McGoldrick* v. *Campagnie Generale Transatlantique,* 309 U.S. 430, 434 (1940), carries much less force than it might otherwise.

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[7] Appellant is lodging with the Clerk of this Court simultaneously with the docketing of this appeal copies of the page of the official transcript of this case in the trial court in which counsel for appellees acknowledged having withdrawn the conspiracy counts, and also copies of that portion of appellee's Amended Complaint in which a fraud count was plead as the Sixth Cause of Action and the full Second Amended Complaint, which did not plead a fraud count.

Fourth, Questions 3 and 4 do not depend for their resolution on development of any facts beyond those which have already been developed in this case. Thus, this Court would in no way benefit from further development of any facts in this case, nor would the Supreme Court of Alabama have benefitted from a fuller record if it had granted appellant's Application for Rehearing. *See generally Illinois* v. *Gates*, 462 U.S., at 221.

Fifth, this Court's ultimate resolution of Questions 3 and 4 may well turn on its decision with respect to substantial issues of first impression in this Court upon which the views of the court below would not necessarily have been illuminating. The highest court of a State is not well situated to decide the question whether the Contract Clause is applicable to its creation of common law obligations. And, as discussed *infra*, past decisions of this Court have contained broad language to the effect that only state statutes—as opposed to the judgments of state courts—are susceptible to challenge under the Contract Clause. There is little, if anything, to be said for requiring appellant to present to the court below, beyond the efforts already made by appellant, arguments which directly challenge broad dicta in cases of this Court such as *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924) (Contract Clause not applicable to judicial action), discussed *infra*, pp. 26-28, by which the court below might appropriately have regarded itself as bound. *See Illinois* v. *Gates*, 462 U.S., at 251 (White, J., concurring in the judgment).

C. The Questions Are Substantial

1. The Unconstitutionality of § 12-22-72, *Code of Alabama* (1975)

Under § 12-22-72, *Code of Alabama* (1975), defendant-appellants, like appellant here, are subjected to an automatic, non-discretionary ten percent penalty, payable to the appellee, upon affirmance of a money judgment, even where the issues are novel, are so complex and open to dispute that they divide the state's highest appellate court almost evenly, and can be decided against the appellant

only by substantially modifying or reversing two recent precedents of that appellate court.

If § 12-22-72 is designed to prevent frivolous appeals, it is manifestly overinclusive and unreasonably severe. At the same time, it is irrationally underinclusive because plaintiff-appellants suffer no penalty for taking an utterly frivolous appeal. Appellant will argue to the Court that this statute, which appears to exist in the same non-discretionary form in only one other State,[8] is irreconcilable with, and therefore must be struck down under, this Court's decision in *Lindsey* v. *Normet*, 405 U.S. 56 (1972).

In *Lindsey*, this Court recognized that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession [during the pendency of the appeal] . . . ." 405 U.S., at 77. However, this Court unanimously struck down as "arbitrary and irrational," *id.*, at 79, the Oregon statute in issue which, notwithstanding adequate statutory protections to secure the fruits of a lower court victory, *id.*, at 77-78,[9] required a specific class of defendants, tenants, to post a double bond in order to appeal from a judgment in favor of landlords. Under the Oregon statute, if the lower court judgment were affirmed on appeal, the landlord would be "automatically entitled to twice the rents accruing during the appeal without proof of actual damage . . . ." *Id.*, at 76. Nor did the double-bond requirement discourage

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[8] In *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978), the Supreme Court of Mississippi rejected a federal constitutional challenge to a post-judgment motion for assessment of a statutory, mandatory five percent penalty against the appellant-defendant in that case.

[9] Under Rule 38, Ala. R. App. P., both plaintiffs and defendants who take appeals in civil cases are treated in an even-handed manner as regards the *damages* and *costs* incurred in defending a judgment that is appealed either by plaintiffs or defendants where the judgment below is affirmed and the appeal is determined to have been frivolous. This rule, in sharp contrast to § 12-22-72, adequately fulfills the legitimate state purpose of curbing abuse of the right to appeal and serves to accentuate the arbitrariness of § 12-22-72.

all frivolous appeals. *Id.*, at 78. Under § 12-22-72, *Code of Alabama* (1975), successful plaintiff-appellees likewise receive a ten percent windfall totally unrelated to any costs they might have incurred, or damages they might have suffered, and plaintiff-appellants are free to take whatever frivolous appeals they wish.

As the *Lindsey* Court stated, a State may act "to discourage patently insubstantial appeals . . . if [its] rules are *reasonably tailored to achieve these ends* and if they are *uniformly and nondiscriminatorily* applied." 405 U.S., at 78 (emphasis added). Section 12-22-72 fails all these tests.

2. The Disqualification Question

In *Withrow* v. *Larkin*, 421 U.S. 35, 46-47 (1975), this Court unanimously reaffirmed the principle, articulated three decades ago by Justice Black for this Court, that:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In re Murchison, 349 U.S. 133, 136 (1955).

It is inconceivable that this *constitutional* principle is not fully applicable to the proceedings of the Supreme Court of Alabama. If it is, then the gravity and substantiality of Question 2, presented to this Court by appellant only after strenuous attempts to have it resolved by the court below, are self-evident.

The essential facts relative to the actions of Justice Embry believed by appellant to disqualify him under the Due Process Clause to have heard appellant's case below are matters of public record. Some of these facts are set forth *supra*, pp. 6-7, and need not be recounted here. The identity between the issues raised in Justice Embry's civil action against Blue Cross and the issues decided by Justice Embry and his four colleagues is obvious and startling. Indeed, the two issues on which the decision below made

substantial new Alabama law, discussed *supra*, pp. 5-7, were directly related to and could predictably resolve in his favor the claims advanced in Justice Embry's Blue Cross case.[10]

In addition to those facts, which of themselves are sufficient to create a substantial constitutional cloud over Justice Embry's participation in this case, the connection between the complaint filed by Justice Embry and the per curiam opinion in this case (written by Justice Embry) is inescapable. In his complaint, Justice Embry alleged conduct by the defendant to be, *inter alia*, "fraudulent," App. F, *infra*, 98a (¶ 6 & 6(d)), a term that appears no fewer than four times in the per curiam opinion below notwithstanding the fact that a fraud count was brought against appellant in this case but was withdrawn prior to trial. And, as pointed out above, the per curiam opinion authored by Justice Embry appears to have "found" appellant guilty of a "conspiracy" even though the conspiracy counts in the case had been withdrawn during trial. Furthermore, in his complaint Justice Embry squarely attacks alleged bad faith *partial* payments. App. F, *infra*, 101a-102a (¶¶ 12 (e), 13). In the case below, the Supreme Court of Alabama held for the first time, overriding its own recent precedent, that partial payment was not a bar to a bad faith cause of action.

Even if the facts were not so overwhelming, the mere potential that the opinion issued by the court below in this case could control or influence the disposition of Justice Embry's claims, standing alone, presents a substantial constitutional question as to appellant's right to a judicial forum free of such a strong appearance of unfairness.

Finally, as demonstrated by the transcript of a deposition given by Justice Embry in his civil action on January

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[10] The appellant's argument would be the same even if Justice Embry's vote in this case had not been the decisive vote, because the participation of Justice Embry in the *consideration* of this case would necessarily taint the entire consideration of this case at least from the day Justice Embry filed his first bad faith civil action.

10, 1985,[11] at the very time that appellant's Application for Rehearing was pending in the court below, Justice Embry discussed aspects of appellant's case in the context of his own case. By this action he not only pierced the veil of confidentiality universally accorded deliberations of appellate courts, but also provided direct evidence of the inappropriateness of his participation in the consideration of this case.

In his deposition, Justice Embry was asked whether, in his civil action against the Maryland Casualty Co., he had sued for bad faith. His response was: "Yeah, sure as hell did. Got that fee." When asked whether that suit had been filed as a class action, Justice Embry responded: "No, no. They just goofed up like the casualty companies do, and other companies." App. G, *infra*, 166a.

Justice Embry went on in that deposition to acknowledge that he authored the per curiam opinion in this case below, App. G, *infra*, 167a, over an "eight or nine" month period in 1984, App. G, *infra*, 168a, during which his civil action against Blue Cross was being prosecuted. He also acknowledged that his opinion began as a dissenting opinion but became the majority opinion in "about November, December of this past year [1984]." App. G, *infra*, 169a.

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[11] As discussed in appellant's Motion for Stay of Execution of Judgment filed in the court below on March 22, 1985, appellant and its counsel below were unable to secure a transcription of Justice Embry's deposition, despite their best efforts to do so, until March 20, 1985, and therefore were unable to ascertain its actual contents and relevance to appellant's motions filed on February 21, 1985 until after those motions had been denied on March 8, 1985. Under Rule 30(f), Ala.R.Civ.P., transcriptions of depositions, once filed with the appropriate court, are part of the court record and are available to members of the general public unless sealed pursuant to a court order issued under the authority of Rule 26(c), Ala.R.Civ.P. No such order was issued with respect to this deposition. The transcript of Justice Embry's deposition was attached as an exhibit to, and incorporated into, appellant's Motion for Suspension of Rules and Motion for Stay of Execution of Judgment filed on March 22, 1985 and is therefore part of the record in this case below for purposes of this Court's taking notice of it. Appellant lodged a copy of the complete transcript with its Application for Stay in this Court on March 25, 1985, and the transcript is reproduced *in toto* in App. G, *infra*, 145a-265a.

When asked whether he had had "any difficulty with processing [insurance] claims" prior to October 1, 1982, Justice Embry responded: "[T]hat is a silly question. For years and years." App. G, *infra*, 173a. With reference to the class action aspect of his civil action, Justice Embry was asked about information he might have received "concerning the allegations" in his complaint, to which he responded: "I got leads from people that I put [my attorney] in touch with." App. G, *infra*, 206a-207a. Later, Justice Embry stated that he had been contacted since the filing of his civil action by "[n]umerous [people who] have read about the lawsuit and read some of the details and said that is typical of the way [they] have been treated . . . ." App. G, *infra*, 228a. All of these contacts occurred while this case was *sub judice* in the court below.

The only reasonable reading of the transcript of Justice Embry's deposition is that at least from the time he first threatened to file a case against Blue Cross for "tortious bad faith," App. G, *infra*, 247a-248a, he harbored strong sentiments regarding claims practices of insurers. He has been deeply and personally involved in litigation raising the very issues on which he was simultaneously enmeshed in drafting the opinion below and in persuading (successfully) a majority of his colleagues to concur in his views.

There is no need for a trial on the merits of the facts related to this question. The documents of record in the State of Alabama discussed above, like the affidavit relied on by this Court in *Berger* v. *United States*, 255 U.S. 22, 32-36 (1921), to disqualify Judge Kenesaw Mountain Landis on the basis of personal bias, sufficiently demonstrate a personal bias on the part of Justice Embry against appellant and similarly situated insurance companies, and a personal interest in both the outcome of, and resolution of, points of law in this case below to require his disqualification under the Due Process Clause of the Fourteenth Amendment if this Court continues to embrace the tenets of *In re Murchison*, as it did only a decade ago in *Withrow* v. *Larkin*, 421 U.S., at 46-47.

3. The Contract Clause Question

The Supreme Court of Alabama has purported retroactively to alter the obligations under a contract in effect in 1977 with respect to liabilities under that contract for actions occurring in 1977 and 1978. Principally, it has added the substantive obligations articulated in 1981 in *Chavers* v. *National Security Fire & Casualty Co.*, 405 So.2d 1 (Ala. 1981), upon pain of the infliction of substantial, arbitrary and unpredictable punitive damages. This drastic obligation was not recognized by Alabama either legislatively or judicially until October 5, 1981. Since 1981, this obligation has undergone further substantial substantive modifications up to and including the decision in this case, all of which were imposed, long *post hoc*, on appellant's consensual contractual relationship with appellees and, in theory, similar contractual relationships between appellant and all of its insureds in Alabama even though appellant calculated premiums, entered into contracts, and established reserves on the premise of a drastically different state of the law as existed prior to October 5, 1981.

In *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), this Court struck down as unconstitutional under the Contract Clause a Minnesota statute which had imposed, retroactively, on the Allied Structural Steel Co. ("Allied") the obligation to make certain additional payments under the contract governing the pension plan maintained by Allied for its employees.

In holding that Minnesota statute unconstitutional, this Court made clear that while the Contract Clause "does not operate to obliterate the police power of the States . . . ," neither is that Clause "a dead letter." *Id.*, at 241. If the obligation imposed on appellant in this case had been imposed by the Alabama legislature in 1981, the substantiality of appellant's Contract Clause claim would rest squarely on the proposition that that legislative act could not, consistently with this Court's decision in *Spannaus* and its precusors in this Court, be applied retroactively on the contractual relationship between appellant and its insureds in Alabama.

That *Spannaus* would provide powerful support for appellant's challenge to such a hypothetical statute cannot be denied. Appellant's business of providing insurance coverage for medical expenses,

> "like other forms of insurance, depends[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer forsees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrance of major unforseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing . . . insurance funds, like other unforeseen events, can have this effect."

438 U.S., at 246-47, *quoting Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 721 (1978).

That a legislative change in the legal rules governing appellant's contractual relationships with its insureds in Alabama such as that imposed by the court below would be "drastic" is adequately demonstrated by the $3,500,000 in punitive damages awarded in this case for failure to pay a $1,650.22 claim. In the business of insurance, claims over a long period of time involving vast numbers of claimants must be actuarially predicted in order to establish appropriate premiums and to set aside sufficient reserves to pay those claims. The contingency that such claims might then be multiplied by a factor of two thousand (or more) to add punitive damages cannot be calculated, computed or anticipated for the purpose of establishing premiums or reserves.

That Alabama would have no substantial countervailing state interest in imposing punitive damages, at least retroactively, under such a hypothetical statute, is an issue upon which three Justices of this Court have expressed strong views. *Smith* v. *Wade*, 461 U.S. 30, 57-65 (1983) (Rehnquist, J., joined by Burger, C.J., and Powell, J.). These views were not disputed by any other members of this Court in that case.

Appellant submits that the question whether Alabama can escape the full force of the Contract Clause as interpreted by this Court in *Spannaus* by the simple fortuitous circumstance that its judicial branch, rather than its legislative branch, legislated this drastic change in the legal rules governing appellant's contractual relationships with its insureds in Alabama is itself a substantial federal constitutional issue.

In 1924, this Court declared that the reinterpretation by a state court of a state statute was not an action, in and of itself, that would constitute a violation of the Contract Clause. *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924). Although the opinion in that case contains broad language suggesting that the word "law" as it appears in the Contract Clause could only mean "statute," *id.*, at 451, that dictum cannot be read as having settled this issue as presented in this case for at least four reasons.

First, where contracting parties enter agreements under which their respective obligations may be dependent on existing state statutory law, it is fair to say that they do so on full notice that an initial interpretation of that law by the state courts or a change in a previous interpretation of that existing state law may have the practical effect of altering their respective obligations. Such a situation is not comparable to one in which an obligation not existing at the time of entering a contract or performance under it may be imposed retroactively on one of the parties. The latter is what happened in this case by Alabama's creation in 1981 of a cause of action for bad faith failure to pay an insurance claim and its application in 1984 under previously unrecognized circumstances to performance under a contract in 1977 and 1978. Whether mere "clarification" of a common law obligation could, by itself, ever run afoul of the Contract Clause is a question which this Court will not have to decide in this appeal because of Alabama's establishment for the first time of a cause of action in 1981 and its radical expansion in 1984.

Second, this Court has long since put to rest the proposition that the word "law" as used in the First Amendment

might be read to encompass only statutes by imposing strict constitutional controls on the exercise by state courts of their power to formulate the rules for common law tort actions sounding in defamation. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). As the Court stated in that case, the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exericsed." *Id.*, at 625. If the broad language of *Tidal Oil* were construed to preclude application of the Contract Clause to this case, then the continuing vitality of *Sullivan* and many subsequent and prior cases would itself present a substantial question.

Third, the elevation of form over substance with respect to what branch of state government created a particular legal rule governing private contractual obligations as suggested by the broad language of *Tidal Oil* could predictably nullify the result reached in cases such as *Spannaus* because the common law power of state courts to create new causes of action, particularly those sounding in tort, is extremely broad and largely unrestrained by the Constitution. For example, would this Court be prepared to hold that the creation today by the Supreme Court of Minnesota of a cause of action against Allied paralleling the statute struck down in *Spannaus* would not be susceptible to challenge under the Contract Clause? Appellant submits that such a result would be an absurdity.

Fourth, this Court's review of challenges to judicial action under the Contract Clause would present no unusual issues because a change in the substance of judicially created law would easily be evaluated under the same balancing approach followed in *Spannaus*.

This constitutional question is substantial because it cannot be regarded as having been settled in *Tidal Oil Co.* Indeed, a careful reading of *Tidal Oil Co.* and every prior case discussed therein discloses no suggestion that the *Tidal Oil* Court thought it was passing on the question presented by appellant here or that any of the cases discussed therein involved appellant's question.[12]

---

[12] None of the many cases of this Court cited and discussed in *Tidal*

(footnote continued)

4. The Excessive Fine and Due Process Clause Question

The per curiam opinion below was straightforward in its statement of the purposes purportedly achieved by the imposition of $3,500,000 in punitive damages in this case for appellant's failure to pay a balance due of $1,650.22 on a total claim of $3,028.25: (1) "to punish the [appellant] for his oppressive, willful acts *and* (2) to warn or deter others in similar businesses from equally reprehensible conduct." App. A, *infra*, 34a. The opinion went on to demonstrate the inherent irrationality usually confined to juries as regards the calculation of punitive damages when, in denying appellant's argument to set aside the award as excessive, the opinion found appellant guilty of "fraud and conspiracy," even though fraud and conspiracy counts initially brought against appellant were withdrawn.

Were this a criminal prosecution, a $3,500,000 punitive award based, even in part, on an appellate court's finding of "fraud" and "conspiracy" would be set aside unless those specific charges had been submitted to a court or jury and decided against appellant. *Cole* v. *Arkansas*, 333 U.S. 196 (1948). The use of these findings against appellant by the court below, even if the award were viewed as civil, was, under *Saunders* v. *Shaw*, *supra*, probably a violation of appellant's federal due process rights. Indeed, if appellant's conduct were punishable under Alabama's criminal statutes related to business fraud and conspiracy, and if appellant had been convicted of business fraud and conspiracy under those statutes after enjoying the full protections of the Sixth and Fourteenth Amendments, the monetary penalty that appellant would have expected to have been assessed would be $3,000, §§ 13A-4-3, 13A-5-12, and 13A-9-41 *et seq.*, *Code of Alabama* (1975). Appellant comes to this Court having been severely punished by the

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(footnote continued from previous page)

Oil Co. v. *Flanagan*, 263 U.S. 444 (1924), involved an argument that the exercise by a state court of its common law power to impose new obligations on contracts through the recognition of a new cause of action would violate the Contract Clause. Thus, that decision cannot be read as dispositive of appellant's challenge to the retroactive imposition on its contract of the obligation created by Alabama in 1981 and reshaped in 1984.

courts of Alabama without having had the benefit of the protection of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment. Whether such unvarnished and excessive punishment in relation to the contract damages involved may be imposed under the Excessive Fine Clause of the Eighth Amendment or under the Due Process Clause *ex proprio vigore,* because of its arbitrariness and capriciousness, presents a substantial question that should be addressed by this Court in this case.

The proportional relationship between the $3,500,000 punitive damage award in this case and the contract damages involved or the potential criminal fine to which appellant might have been exposed is so staggering as to call on this Court, in the words of Justice Brandeis, "applying the Eighth Amendment, [to] make clear the 'difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice.' " *Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 435 (1921) (Brandeis, J., dissenting), *quoting Weems* v. *United States,* 217 U.S. 349, 381 (1910). *See also Solem* v. *Helm,* 463 U.S. 277, 103 S. Ct. 3001 (1983).

The question whether the Excessive Fine Clause is applicable to a punitive damages award which is grossly disproportional to the invasion of legal rights at issue is one of first impression in this Court but is no less substantial for that reason. Although this Court suggested in *Ex parte Watkins,* 32 U.S. (7 Pet.) 357, 361 (1833), that the Excessive Fine Clause serves to control only federal courts exercising criminal jurisdiction, that suggestion was dictum and, as observed by Justice Brandeis above, there would be no reason in principle not to apply that Clause to an excessive fine imposed for punitive purposes in a civil case if, as this Court has subsequently done. *See Furman* v. *Georgia,* 408 U.S. 238 (1972), the Eighth Amendment is to be applied at all to the States.

Whether addressed under the Excessive Fine Clause or directly under the Due Process Clause of the Fourteenth Amendment, the gross disproportionality of the fine in this

case, exacerbated by the operation of § 12-22-72, *Code of Alabama* (1975), which imposes a penalty on a penalty, presents a substantial federal question. There is no state interest in permitting this excessive fine to be awarded in this case, other than perhaps the State's interest in providing a "windfall," *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting), to private citizens. There is no significant state interest in meting out punishment in a civil proceeding "based upon the caprice and prejudice of jurors." *Id.* And there is no deterrence here, assuming, *arguendo*, the imposition of excessive punitive damages ever has a significant deterrent effect, because the acts for which appellant is being punished occurred before the legal duty found to have been violated was even recognized in Alabama or its substantive content known to appellant or other insurers.

The decision below is not an aberration. On February 8, 1985 the Supreme Court of Alabama affirmed a directed verdict of $46,065 on a contract claim and $1,250,000 in punitive damages on a bad faith failure to pay an insurance claim in *Nationwide Mutual Insurance Co.* v. *Clay*, Nos. 82-537 & 82-917 (Ala. Feb. 8, 1985). App. I, *infra*, 285a. This Court has the power and responsibility to place constitutional restraints on such arbitrary awards before a proliferation of such verdicts ensues. The punitive damage award here is excessive both in kind because it serves no valid state purpose, and in degree because it is grossly disproportionate to the contract damages in this case.

CONCLUSION

Taken individually, appellant's federal constitutional claims are quite substantial. Appellant has been fined an amount vastly out of proportion to the damage which its conduct was found to have caused and it has been fined again in an amount hundreds of times greater than actual damages for the simple act of seeking recourse to the state's highest court. Its contractual obligations have been reformed retroactively far beyond any standard of foreseeability. Its case has been decided by a court which included a Justice with strong personal feelings regarding

appellant's business and a personal and fiduciary stake in the outcome of the legal issues under consideration.

Collectively these claims present a picture of a litigant deprived of many of the safeguards regarded as fundamental to the concept of due process. Probable jurisdiction should be noted.[13]

Respectfully submitted,

*Theodore B. Olson
John J. Swenson
Larry L. Simms

Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Of Counsel:

Peter V. Sintz
William M. Cunningham, Jr.

Sintz, Pike, Campbell & Duke
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

**Counsel of Record*

April 9, 1985

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[13] Because the court below denied appellant's Motion for Stay of Execution of Judgment, another ruling in this case apparently without precedent where a good and sufficient supersedeas bond has been posted, appellant sought an immediate stay of execution of the judgment from Justice Powell as Circuit Justice for the Eleventh Circuit. *Aetna Life Insurance Co.* v. *Lavoie*, No. A-728. On March 26, 1985, Justice Powell granted a temporary stay pending receipt by the Court of a response from appellees. Appellees filed a response on April 1, 1985, to which appellant responded on April 4, 1985. The March 26, 1985 order is reproduced in App. J, *infra*, 315a.

84-1601

No. ——

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

Appendix to Jurisdictional Statement on Appeal From the Supreme Court of Alabama

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APPENDIX FOR APPELLANT

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*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Of Counsel:

PETER V. SINTZ
WILLIAM M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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APPENDIX A

THE STATE OF ALABAMA — — — — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

82-426 & 82-1152

AETNA LIFE & CASUALTY CO., INC.

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.

APPEALS FROM MOBILE CIRCUIT COURT

[Filed Dec. 7, 1984. Clerk, Supreme Court of Alabama]

PER CURIAM.

These cases, involving a claim of bad faith refusal to pay an insurance claim, have been before this court on two previous occasions. *Lavoie* v. *Aetna Life & Casualty Co., Inc.*, 374 So. 2d 310 (Ala. 1979); *Lavoie* v. *Aetna Life & Casualty Co., Inc.*, 405 So. 2d 17 (Ala. 1981). On the first appeal, we reversed the trial court's granting of the defendant/insurer's motion to dismiss for failure to state a claim. On the second appeal, we reversed the trial court's summary judgment for the defendant on two bad faith refusal to pay counts and summary judgment for the plaintiff on the contract counts.

In the instant cases, the insurer "admit[ted]" at the close of the plaintiff's evidence that the plaintiff had "made out a *prima facie* case to recover" on the contract of insurance, but moved for a directed verdict on the bad faith counts. The trial court denied the motion. The case went to the jury on two counts of bad faith refusal to pay, and on the contract claim. The jury was out for fifty minutes and returned a verdict for the plaintiffs in the sum of $3,501,650.22, of which sum $3,500,000 was for punitive damages. The defendant filed motions for judgment not-

withstanding the verdict, or in the alternative, remittitur, or in the alternative, for a new trial. The trial judged denied the motions. The question presented on this appeal is whether the evidence presented a jury question on the tort of bad faith refusal to pay an insurance claim.

THE EVIDENCE

The plaintiffs, Margaret and Roger Lavoie, are husband and wife. Mrs. Lavoie was insured as a dependent under a group policy of health and medical insurance issued by the defendant, Aetna Life and Casualty Company, Inc., (hereinafter Aetna). Mr. Lavoie had been a policeman for the City of Mobile, but was retired on disability because of a brain tumor. The plaintiffs lived approximately forty miles from Mobile at the time this claim arose.

Mrs. Lavoie was examined by John B. Douglas, M.D., at his office on or around 31 January 1977. Mrs. Lavoie had telephoned Dr. Douglas and requested the examination. Upon her arrival at his office, Dr. Douglas arranged for Mrs. Lavoie to proceed directly to an examination room, rather than waiting, as was customary. Dr. Douglas testified this was done because of his concern over the symptoms Mrs. Lavoie had related to him in the telephone conversation. After an examination of Mrs. Lavoie, Dr. Douglas recommended to both Mr. and Mrs. Lavoie that Mrs. Lavoie be admitted to the Mobile Infirmary Hospital. The hospital was "full" so arrangements were made for admission when a room came available. Mrs. Lavoie was admitted to the hospital on 3 February 1977.

On the day of admission, Dr. Douglas dictated a "History and Physical Summary." In pertinent part this summary reads:

> "This 54 year old lady has been followed in the past for mechanical low back pain and osteoarthritis. She had not been seen in our office in about 3 years. She came in with the interval history that she had been

retired for 2 years, that her arthritis had become more active over the last several months and she was having generalized arthritis pains in her back, neck and all extremities particularly in the hips, left knee and around the pelvic area. She complains of being very nervous. She said that she has been noticing som intermittent bleeding from the bowel and has a past history of diagnosis of chronic ulcerative colitis. Because of the general exacerbation of her arthritis and the apparent exacerbation of her ulcerative colitis, she is admitted at this time for evaluation and treatment.

"PAST HISTORY: She had gall bladder surgery in 1970, a fibroid tumor removed in 1946 and an exploratory laparotomy in 1953. She has a history of a couple episodes of pnemonia [sic] but denies history of peptic ulcer, hepatitis, rheumatic fever, diabetes or hypertension. She has a questionable history of glaucoma, does not know the severe state of it. She has had episodes of chest pain in the past, about 4 years ago, none recently. No diagnosis or EKG's were done at the time of the pain.

"FAMILY HISTORY: Positive for hypertension and she has a brother who had 1 episode of what was called inflammatory arthritis as a child. No family history of cancer, diabetes or early heart disease."

Mrs. Lavoie was in the hospital a total of twenty-three days. During this period, Dr. Douglas, or his partner, ordered medical diagnostic tests to be completed on Mrs. Lavoie, an electroencephelogram (EEG), and electrocardiogram (EKG), a gastrointestinal series (GI series), a barium enema, a computer assisted tomogram (CAT scan) and various other tests. During her stay in the hospital, Mrs. Lavoie complained of headaches, dizziness, diarrhea, nervousness, problems with her family, blood in her stools, pain in her abdomen, joint pain, and shortness of breath.

The evidence shows that Aetna had knowledge of these complaints before it finally denied the claim.

Dr. Douglas dictated a "discharge summary," after Mrs. Lavoie's discharge on 26 February 1977, which reads in full:

> "54-year-old white female who was admitted with an abdominal pain, osteoarthritis and mechanical low back pain. She had not been seen in my office for three years when she came in because of general aching and particularly saying that she had had intermittent bleeding from the bowel and had a past diagnosis of chronic ulcerative colitis. We are unable to substantiate this diagnosis in the hospital. In fact, she had a negative GI workup. Her musculoskeletal complaints while she does have some normal amount of osteoarthritis varying from place to place for her age, it is not really outstanding and her general situation suggests that she considerable [sic] psychogenic overlay to her somatic symptoms, and therefore, they are somewhat exaggerated. She has been placed on Mellaril in depth. She has shown some suggestion of slight improvement in the hospital but continues to somaticize her symptoms rather vigorously. It has been explained to her that this is primarily a nervous problem and we have mentioned that she may need the help of a psychiatrist if she does not continue to improve following discharge.
>
> "DISCHARGE DIAGNOSIS: OSTEOARTHRITIS,
> MILD
> PSYCHOPHYSIOLOGIC
> REACTION
> MANIFESTED BY
> ABDOMINAL PAIN."

On 3 March 1977, the hospital completed the appropriate forms and forwarded them along with the two summaries, the physician's progress notes and various other data such

as the consultation on the EKG, to the Aetna office in Mobile. Included was a bill for $3,028.25. The supervisor of the Mobile office of the insurer, Alice Murphy, sent a request to the hospital for further information on 24 March 1977. This letter in pertinent part read:

> "It would be greatly appreciated if you would send complete hospital records including, admitting and discharge summary, nurses and physicians notes."

On 5 April 1977, *before receiving* anything further from the hospital, Brenda Harris, a claim worker for Aetna, forwarded the information she had from the hospital to Jean Becker, a "Senior Claims Examiner," in Aetna's office in Hartford, Connecticut. To the information forwarded, Harris appended a memorandum stating:

> "In our opinion a 23-day confinement for the diagnosis was not necessary. Hospital records do not indicate anything to the contrary."

In pertinent part, Aetna's response reads:

> "DATE: April 27, 1977
>
> ". . . .
>
> "This file has been reviewed with a member of the Medical Dept. On the basis of the limited information submitted, this confinement does not appear to have been medically necessary. We feel this patient could have been evaluated and treated on an out-patient basis.
>
> "Several of the X-ray and lab procedures performed are not usual and customary for the diagnsois given. These include the CAT scan, EEG and EKG. Since the City of Mobile policy clearly limits coverage to services and supplies which are reasonably necessary for the diagnosis and treatment of nonoccupational disease or injury, room and board charges as well as the aforementioned miscellaneous charges must be denied. Thank you."

The Lavoies received notification, by a letter from Harris, on 3 June 1977, which reads in full:

> "After having this file reviewed by our Medical Department we must, at this time, deny benefits for room and board charges.
>
> "From the information we submitted to them it appears the evaluation and test could have been performed on an out-patient basis. Also, we must deny charges for the CT Brain Scan, EEG and EKG since they are not usual and customary procedures for the diagnosis given.
>
> "If you have any questions please feel free to contact this office."

The defendant then paid $1,057.20 to the hospital for the medical diagnostic tests, other than the EEG, EKG, and CAT scan, and did not pay for physical therapy and a back brace. Dr. Douglas was paid $305.20 and the Lavoies were paid $217.34 directly. The parties stipulated the remainder on the claim was $1,650.22.

On 4 November 1977, Dr. Douglas wrote a very detailed medical report to Thomas J. Stein, Mrs. Lavoie's attorney at the time: It reads:

> "Mrs. Lavoie was first seen here in 1973 and we continued seeing her on a regular basis for several months until January of 1974. At that time she had complaints of 'muscular rheumatism.' She was concerned about severe medical illnesses such as muscular distrophy and multiple sclerosis because of her muscular pains. she was reassured that her problem was nothing of that nature.
>
> "Her past history at that time was that three years previously she had been given the diagnosis of chronic ulcerative colitis. She was not under treatment for

this when I saw her and was not having any problems as regards this. I thought she had a mechanical low back pain and a chronic anxiety syndrome.

"She disappeared from follow-up on January 3, 1974 and did not return until January 3, 1977. At that time she told me she had been retired for two years; and her arthritis was bothering her all over. It was in her hips, her left knee, her pelvis, and she was also very nervous. She reported having had bright red bleeding from the bowels. She was quite anxious, seemed to have flight of ideation, and changes in personality which I had not noted when I had seen her previously.

"Because of this she was admitted to the hospital for studies which were appropriate for personality change. These included CT Brain Scan, and EEG. All tests were negative and we felt that this was a rather severe anxiety syndrome and with the negative general workup felt that she was having a psychophysiologic reaction manifested by abdominal pain and anxiety.

"I believe that this summary shows that the workup which was done was appropriate in ruling out organic and abdominal disease and also organic intracranial disease. I hope this clears the matter to your satisfaction."

This letter was introduced into evidence. There was an unsigned notation on the letter from Dr. Douglas, which Harris testified she had made after a telephone conversation with Tom Hutton, a senior claims examiner in the Hartford, Connecticut office. The notation reads:

"11/9 Called Tom Hutton HO [home office] he said maintain denial—if they act like they are going to file suit send back to him."

Harris further testified that she had read Dr. Douglas's letter to Hutton over the telephone and that the notation was an indication of Hutton's decision. Harris testified, as did Hutton, that no one else in the Connecticut office reviewed the letter from Dr. Douglas.

On 14 November 1977, Harris, by letter to the Lavoies' attorney, again denied the remainder of the claim.

> "Thank you for the copy of the letter sent to you November 4, 1977, by Dr. Douglas since we had tried unsuccessfully on several occasions to get a letter from him. However, Dr. Douglas does not give us any information in his letter that we did not have in our copies of the hospital records. He does not state why the test had to be done as an inpatient nor why a 23 day hospital confinement was necessary. The test on the hospital order sheets were tests that could have been done as an outpatient. The doctor, in his letter and in his hospital records, does not give any indication as to why he could not have done the test as an outpatient.
>
> "Without some further information from the Doctor as to why hospital confinement was medically necessary, we must maintain our denial."

The Lavoies' attorney then had Dr. Douglas write another letter and forwarded it to Harris. This letter read:

> "I don't know of anything further I can say to establish that inpatient care was necessary for the testing and treatment of Mrs. Lavoie. Let me again point out the personality change in Mrs. Lavoie. In my best judgment she needed the controlled atmosphere of the hospital for observation and to carry out necessary testing."

An unsigned notation on the second letter read:

> "12/20 Called Tom Hutton. He stated continue to deny claim on info available to us —"

Harris testified this was her handwriting and was an indication of a telephone call she made to Hutton in the Hartford office. She testified she had read Dr. Douglas's second letter to Hutton, after which he again instructed her to deny the claim. Mrs. Harris wrote to the Lavoies' attorney on 23 December 1977, informing them of the denial:

> "Thank you for your letter of December 19, 1977, with its attachment.
>
> "I have again checked with our Medical Department on this matter and they have advised that, based on the information available to us, we must continue to deny any benefits for the room and board.
>
> "If there is any additional information which might alter our decision, we would be most happy to consider it."

On 8 April 1978, Aetna's Mobile office wrote to the Mobile Infirmary requesting the nurse's notes which were then mailed to the Mobile office of Aetna. In turn, these nurses' notes were forwarded to R. E. Mann, a senior claims examiner in Hartford, who placed them with the admission and discharge summaries, physician's progress notes and physician's orders. He sent them to Aetna's Doctor Swan of the Medical Department, accompanied by his notation:

> "(D) We now have nursing notes, which we did not have for the original review.
>
> "Question: Should we change our original decision, based on the nurse's notes?
>
> "Opinion: No. The nurse's notes do not indicate that in-patient confinement was medically necessary.
>
> "R. E. Mann"

The two letters from Dr. Douglas *were not* in the file reviewed by Dr. Swan.

On 28 July 1978, Mann informed the Mobile office of another denial:

> "[I]n response to your memo dated July 10, 1978, forwarded to Tom Hutton about the above claimant. . . .
>
> "*Opinion*
>
> "We should maintain our original claims determination for the charges incurred by Mrs. Lavoie related to her confinement and services of Feb. 3 through Feb. 25, 1977.
>
> "*Rationale*
>
> "Our Home office Medical Staff has again reviewed this claim including the nurse's notes. They advise that in their opinion, in-patient confinment was not indicated for the claimant's wife's condition. The necessary test and evaluations could have been performed on an out-patient basis.
>
> "*Suggested Course of action*
>
> "Please advise the claimant with a copy to his attorney that his claimant has been again reviewed by our Home office Medical Staff. Under the group coverage, they still believe that our original benefits determination was correct."

Aetna's Mobile office informed the Lavoies of that last denial by letter dated 3 August 1978.

The provisions of the insurance contract, pertinent to this case, are:

"ARTICLE II—BENEFITS

"COVERED MEDICAL EXPENSES

"Covered Medical Expenses are the reasonable charges which an employee is required to pay for the following services and supplies received by a covered family member for the necessary treatment of any non-occupational injury or non-occupational disease:

"HOSPITAL EXPENSES: These are the charges made by a hospital, in its own behalf, for (a) Board and room. . . .

". . . .

"EXCLUSIONS, LIMITATIONS AND PROVISIONS APPLICABLE TO ALL TITLES UNDER ARTICLE II

". . . .

"No insurance is afforded under any Title of Article II as to charges

". . . .

"(5) for care, treatment, services or supplies which are not necessary for the treatment of the injury or disease concerned nor to the extent that any charges for care, treatment, services or supplies are unreasonable. . . ."

Aetna raises four issues on appeal:

"(1) Whether the plaintiffs met their burden of proof on the bad faith refusal claim;

"(2) Whether the partial payment made by Aetna precluded a finding of bad faith refusal to pay;

"(3) Whether the evidence adduced at trial was sufficient to support an award of punitive damages in the amount of $3,500,000 against Aetna;

"(4) Whether the trial court erred in allowing the plaintiff, Roger Lavoie, to give testimony, over Aetna's objection as to the plaintiff's poor financial condition."

Under the evidence in *this* case, questions one and three must be answered in the affirmative. Questions two and four must be answered in the negative.

I

The evidence is overwhelming that Aetna acted in bad faith. Its conduct placed it squarely within the definition of bad faith as stated by Justice Beatty in *Gulf Atlantic Life Insurance Co.* v. *Barnes,* 405 So. 2d 916 (Ala. 1981):

> " 'No lawful basis' . . . means that the insurer lacks a legitimate or arguable reason for failing to pay the claim. . . . 'Coupled with actual knowledge of that fact' implies conscious doing of wrong. Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill-will." Id., at 924.

and

> "The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. *Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proofs submitted by the insured."* Id. (Emphasis added.)

Did Aetna review the claim on four separate occasions, in good faith, considering all facts available to it and

according to its own established rules and procedures? To the contrary, the record is replete with evidence that at no time did Aetna review the claim in good faith, consider all the facts available to it and comply with its own established rules and procedures. It never obtained the hospital progress records or progress notes.

Brenda Harris, a senior claims processor in the Aetna Mobile office, with twelve years' experience in handling claims, was the first one to examine the Lavoie claim and, at the time, was primarily responsible for the claim within the Aetna Mobile office. She testified the denial of the claim was solely because of the reasons stated in the letter from Harris dated 3 June 1977.

Harris testified that Mrs. Lavoie's admitting diagnosis, ulcerative colitis, would have qualified her for coverage under the group medical policy that had been underwritten by Aetna, and the policy itself was in full force and effect at the time of Mrs. Lavoie's admission to the Mobile Infirmary.

Harris, on 5 April 1977, had sent some medical records to one Jean Becker, an Aetna senior claims examiner in Hartford, for review. They were identified by Dr. Bernard Swan, a member of Aetna's Home Office Medical Department, the only physician at Aetna who ever reviewed the Lavoie claim. He identified them as the admitting sheet, with diagnosis; medical history and physical; doctor's orders; discharge summary and certain extraneous information. The nurses' notes, which Dr. Swan stated were an integral part of the chart, were not supplied at that time. They were not obtained until April of 1978, a year later. Harris, at the Mobile office, acknowledged that the nurses' notes were not included in the information originally sent to the home office at the time of the first denial. She testified that significance of the nurses' notes was that they contained daily information on what was done to the patient,

what medications were administered, and whether a patient was experiencing pain or physical illness on a given date. Tom Hutton, an Aetna Home Office senior claims examiner at the time of his review of the Lavoie file in 1977, also testified he considered the nurses' notes to be a significant portion of any medical file, much more so from a physician's standpoint than a nurse's standpoint. The patient's progress notes were also omitted from the information sent to the home office during the first review of the Lavoie claim. Hutton also noted the significance of the patient's progress notes in a hospital file. Also, he said that, procedurally, had he seen certain of the entries that were actualy on Mrs. Lavoie's progress chart during this review of a claim he would, recognizing he is not medically qualified to make a decision as to whether a person's hospitalization would be reasonable in light of such information, first go through his Medical Department for a medical doctor's review before denying Lavoie's claim.

It should be noted there were a total of *four* reviews and four separate denials of the Lavoie claim *by the Aetna Home Office claims staff*. At *no time* did Aetna *ever* obtain Mrs. Lavoie's progress records and progress notes during its respective reviews and denials of the claim.

After submission of the Lavoie material to Aetna's Home office, it responded, on 27 April 1977 by directing its Mobile office to deny payment of the room and board charges and those charges for tests, including CAT scan (computer assisted tomogram), EEG (electroencephlgram) and an EKG (electrocardiogram), administered to Mrs. Lavoie during her hospitalization. The Home Office response stated the file had been reviewed with "a member of the Medical Department" and further that "on the basis of limited information submitted, this confinement does not appear to have been medically necessary. We feel this patient could have been evaluated and treated on an out patient basis." Payment of these charges was denied

because, allegedly, the tests were not "usual and customary for the diagnosis given."

According to the evidence, Aetna's Medical Department's alleged review was the primary reason for denial of the Lavoie claim. Aetna's Becker testified that, in her experience as a group claims representative in the field, the procedure for handling such group medical claims was to refer them to the senior claims examiner at the Home office, who in turn would refer the claim to the Medical Department.

Aetna's witness, Dr. Swan, testified he, as an associate medical director, worked in the claims department and reviewed complicated problems which required a medical opinion.

In the 27 April 1977 inter-office memo, Becker, the senior claims examiner in Hartford, speaks about review of the subject file "with a member of the Medical Department." She did not consider herself as being in the Medical Department. The reference to a member of the Medical Department is obviously a reference to Dr. Swan. This fact is shown by Dr. Swan's own testimony. Becker's testimony makes clear that her reference to the Medical Department was a reference to the doctor. Clearly, Hutton, the senior analyst in Hartford, according to Becker, was not a member of that Medical Department.

Dr. Swan testified the "Claim Medical Department" was comprised of six physicians. The testimony of Becker shows it was the customary procedure at Aetna for the various regional claims offices to refer claims to the senior examiners in the Home Office, who in turn referred the claims to the Medical Department for review.

The testimony of Harris acknowledges that her deposition testimony, in January 1980, made a clear distinction between Hutton, the senior claims examiner at the Home

Office, and the Home Office medical department. Harris, *in her trial testimony*, admitted that in her entire deposition she never stated Hutton and the Medical Department at Hartford meant one and the same thing to her.

The following appears during Harris's testimony:

> "Q: Do you recognize the medical department as being physicians, don't you?
>
> "A: I do now, yes, sir.
>
> "Q: No ma'am no. At the time you gave this deposition before you gave your affidavit, at the time you gave your deposition.
>
> "A: At the time I gave my deposition I did, yes, sir.
>
> "Q: O.K. and before you gave the affidavit, right?
>
> "A: Right."

However, in her affidavit of 28 February 1980, about thirty-five days after her deposition, filed in support of Aetna's motion for summary judgment, she swore:

> "I understand that an ambiguity may exist concerning my letter of December 23, 1977, to Thomas J. Stein. I stated in that letter that I had again checked with our Medical Department on this matter and they have advised that based on the information available to us, we must continue to deny benefits for the room and board."

In the same affidavit, Harris noted that she customarily referred to the senior claims examiner in Hartford as "our Medical Department."

On 4 November 1977, Dr. Douglas, Mrs. Lavoie's treating physician wrote a very detailed report to Thomas J. Stein, Mrs. Lavoie's attorney at the time. Dr. Douglas explained in detail why Mrs. Lavoie required a twenty-

three day period of confinement and why the tests, for which Aetna declined to pay, were relevant and necessary for her treatment at the time they were prescribed. Harris received the letter as an enclosure in a letter from attorney Stein to Aetna dated 8 November 1977. Harris called Hutton, the senior claims examiner at Hartford, on 9 November 1977. She testified she told Hutton she had additional information concerning the Lavoie file. She had no dealings with him on the Lavoie file before that time. She then read him the letter from the lawyer and from Dr. Douglas. After she read the doctor's letter to him Hutton instructed Harris to:

> "Maintain the denial. If they act like they are going to file suit, send it back to me."

Shortly thereafter she wrote Stein, continuing to deny the claim and implying a need for more information. On 19 December 1977, Stein again wrote Aetna, sending another report from Dr. Douglas that attempted to answer Aetna's questions regarding the treatment he rendered Mrs. Lavoie. The next day, 20 December 1977, Harris again called Hutton. Again, Hutton did not have a medical doctor on the telephone with him. She read Hutton the letter from Dr. Douglas. After the letter was read, Hutton directed her to continue denying the benefits based on the information available, and directed her to write the denial letter of 23 December 1977. In response to those directions from Hutton, Harris wrote to Stein:

> "I have again checked with our Medical Department on this matter, and they have advised that, based on the information available to us, we must continue to deny any benefits for the room and board."

That was in spite of two medical reports showing that hospitalization was necessary to rule out organic abdominal disease and also organic intracranial disease.

Harris and Hutton acknowledged that no medical doctor had ever reviewed either of the two medical reports that had been submitted to Aetna by the Lavoies.

Clearly, on two of the four separate and distinct denials of the Lavoie claim, Aetna violated all of its own recognized principles and procedures for handling such claims; by-passing the Medical Department that was the only source of medically qualified information available to Aetna and deliberately, intentionally and recklessly representing to the Lavoies that their file had been reviewed by a "member of the Medical Department."

Aetna's Dr. Swan told of the importance of having a member of the Medical Department, a physician, to pass judgment on complicated problems which require a medical opinion. Nevertheless, Harris wrote the Lavoie's attorney on 23 December 1977 stating she had "again checked" with the "Medical Department" regarding Dr. Douglas's letters. As a matter of fact, as of 23 December 1977, no member of the Medical Department had been consulted regarding Dr. Douglas's letters. She was fully aware of this when she wrote the 23 December 1977 letter to Stein.

The significance of Dr. Douglas's medical reports was noted by both Harris and Dr. Swan. Harris testified she recognized the importance of a treating physician's report to Aetna's Medical Department. She responded to questioning along this line as follows:

"Q: What is the importance of a doctor's report to the Medical Department?

"A: The Medical Department has to base their decision on what the doctor informs them.

"Q: And that's a hard and fast rule, isn't it?

"A: Yes, sir.

"Q: O.K., and the Medical Department has to review that doctor's report, isn't that right?

"A: Yes, sir.

"Q: No exceptions to that to your knowledge?

"A: Not to my knowledge.

"Q: You know that Mr. Hutton is not a medical doctor, don't you?

"A: Yes, sir.

"Q: Did you know it at the time that you called him on November 9, 1977?

"A: I knew that he was not a doctor, yes.

"Q: You knew that he was not a trained medical physician, correct?

"A: Yes, sir.

Dr. Swan's job at Aetna's Home Office Medical Department, he testified, was to "review complicated problems which require a medical opinion." He went on to volunteer the following under questioning by Aetna's own counsel:

"Q: Did you consider Dr. Douglas' letter?

"A: Yes. I was thumbing through it to try—I was interested in reviewing the letter, whether that's responsive to your question.

"Q: Yes, I was going to ask you. Did you pay attention to his letter? Did you read it?

"A: Yes, I did. I think the most important bit of information we like to get in such cases is a narrative report from the treating physician. It's the most logical source of information."

Another example of Aetna's intentional and fraudulent efforts to deceive the Lavoies was in connection with the initial handling and denial of the Lavoie claim. The initial request by the Mobile Office to the Hartford Group Claims office for a review of the Lavoie file was made on 5 April 1977. The Hartford Claims Office responded on 27 April 1977 with its initial denial. Becker recited that "this file has been reviewed with a member of the Medical Department." The evidence indicates that Dr. Swan, the only member of the Medical Department of Aetna who ever reviewed the Lavoie file, did not review the file material and records until 28 April 1977, one day *after* the original denial was sent to Mobile. Dr. Swan's own handwritten notes in the Home office file clearly show the first day he ever worked on the file was 28 April 1977. Dr. Swan worked in the Group Claims Office on only one day per week. 28 April 1977 was a Thursday. The date in Dr. Swan's own handwriting is "4-28-1977."

R. E. Mann, another Aetna senior claims processor who reviewed the file, noted that "[w]e reviewed *on 4/28/77* and denied coverage of some charges." Two to three months before the trial of this case and after it had been submitted to this court on appeal on two previous occasions where the critical nature of this particular date had become obvious, Becker, a senior claims examainer in Hartford, testified the "28" was a "25." Apparently, the jury didn't believe her.

Comparison of a "5" in Dr. Swan's handwriting found in the transcript with what Aetna contended was a "5" located elsewhere in the transcript makes it clear that Dr. Swan's review of the Lavoie file had been made on 28 April 1977, the day after the denial had been rendered by Ms. Becker.

Viewing this evidence most favorably to the Lavoies, the jury apparently rightfully concluded that senior claims

adjustors writing final denials and then later going to the medical staff for rubber stamp approval was all in violation of Aetna's own in-house procedure, which required that medical claims be denied by a medical doctor, and further that such was wilful and bad faith conduct. Dr. Swan's testimony clearly indicated he was contacted only on complex cases requiring a medical opinion. The denial had already been made on this "complex" case without any medical opinion whatsoever when the initial denial was made on 27 April 1977.

It is conclusive evidence that, at the time the first of the four denials was made of the Lavoies' claim, Aetna had *no legal justification for denial of the claim at all,* having established by its own testimony that a medical opinion is required in order to properly deny such a claim, and the evidence clearly and convincingly shows that such a medical opinion was *not obtained before the denial was made.*

A review of Mann's handwritten summary of the Home Office's fourth review of the Lavoie file, and comparison of it with Dr. Swan's testimony on this point reveals that absolutely *no* mention is ever made by Mann of any new consultation with a physician in the Aetna Medical Department on the basis of the newly submitted information, the nurses' notes. But, on 25 July 1978, Mann rendered his own opinion that the denial should be maintained. According to Dr. Swan, three days later, 28 July 1978, a Friday, is the first time he ever looked at the newly submitted nurses' notes on this particular review of the file. Dr. Swan's handwritten notes, made on this second review, clearly shows his review took place on 28 July 1978.

Mann's 7-25-78 handwritten review and his 28 July 1978 inter-office communication contain no reference to either of Dr. Douglas's reports generated in November and December of 1977.

Hutton did not consider himself, as a senior claims adjuster, qualified to render a medical opinion. "That's why we have our Medical Department," he testified. Further, that Dr. Swan was consulted on "complicated problems which *require* a medical opinion," Harris stated "the Medical Department has to base their decision on what the doctor informs them [in his doctor's report]." This was a hard and fast rule at Aetna, with no exceptions. A review of the documents generated at Aetna note the significance of, and the necessity for, the Medical Department's review. Virtually every document generated by the Claims Department states: "Our Home Office medical staff has again reviewed this claim."

There is a plethora of other places in the record of testimony and exhibits from which the only conclusion a reasonable person could draw is that Aetna, through its employees, was guilty of fraud, bad faith, and unfair dealing, had a dishonest purpose, and was motivated by self interest and ill will.

Clearly, then, under the evidence *in this case,* the "directed verdict on the contract claim" test is inapplicable because this is not the ordinary or normal case. *Safeco Ins. Co.* of *America* v. *Sims,* 435 So. 2d 1219 (Ala. 1983); *McLaughlin* v. *Alabama Farm Bureau Mut. Cas. Ins. Co.,* 437 So. 2d 86 (Ala. 1983).

In order to fully comprehend the "extraordinary nature of this case, it is first necessary to review the policy considerations, elements, and instructive guide posts set out by this court in earlier case law.

This court first recognized an actionable tort for an insurer's intentional refusal to pay a direct claim in *Chavers* v. *National Security Fire & Casualty Co.,* 405 So. 2d 1 (Ala. 1981). Such a claim arises where there is either:

> "'(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure

> to determine whether or not there was any lawful basis for such refusal.' "

The policy considerations inherent in this cause of action are that the law cannot tolerate, nor will it allow, the willful, deliberate refusal on the part of the insurer to evaluate or honor a claim with the knowledge that the avowed purpose of the insurance contract was to protect the insured at his weakest and most perilous time of need. *Vincent* v. *Blue Cross-Blue Shield of Alabama,* 373 So. 2d 1054, 1067 (Ala. 1979) (Embry, J., dissenting).

As noted above, *Gulf Atlantic Life Insurance Co.* v. *Barnes,* 405 So. 2d 916 (Ala. 1981), defined the second tier of the tort of bad faith as set out in *Chavers.* Justice Beatty's instructive voice is particularly applicable here and bears repeating:

> "The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a *reckless indifference to facts or to proof submitted by the insured* . . . ." (Emphasis added.)

Gulf Atlantic Life Insurance Co., 405 So. 2d at 924.

Gulf Atlantic's instructions evidence this court's initial concern that the existence *vel non* of bad faith must be measured not in a vacuum, but under the circumstances, and *at the time that the insurer denied the claim.* Accordingly, where an insured relies upon the second tier of bad faith, as in this case, the insurer's reckless indifference to facts or to proofs submitted by the insured must be measured *at the time of the denial.*

National Security Fire & Casualty Co. v. *Bowen,* 417 So. 2d 179 (Ala. 1982), reiterated the elements of a bad faith action:

> "(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> "(b) an intentional refusal to pay the insured's claim;
>
> "(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> "(d) the insured's actual knowledge of the absence of any legitimate or arguable reason;
>
> "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." *Id.,* at 183.

In determining that sufficient evidence was not produced which eliminated any "arguable reason" for National Security's refusal to pay plaintiff's claim, this court focused entirely upon an investigator's report, which was reviewed by National Security, and the concomitant circumstances. In fact, the court unambiguously declared:

> "[T]hese principles cause us to inquire into the evidence establishing the reasons which prompted Rufus D. Johnson to recommend not paying Bowen the balance due under the policy. In exploring those reasons *we must consider the information before Johnson at the time he made the decision not to pay Bowen.*" *Id.*

On still two more occasions this court has reiterated this most important factor in determining the existence *vel non* of bad faith.

> "Whether an insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision is made . . . ." *National Savings Life Insurance Co.* v. *Dutton,* 419 So. 2d 1357, 1362 (Ala. 1982); *Federated Guaranty Life Insurance Co.* v. *Wilkins,* 435 So. 2d 10 (Ala. 1983).

The obvious reason for reviewing only the information and circumstances before the insurer at the time of the denial, is to view the conduct of the insurer within the factual framework existing at the time of its actions. To adjudge the existence *vel non* of fad faith in any other environment would be merely an exercise in judicial fiction.

Aetna insists that the conflicting testimony developed at trial concerning the reasonableness and necessity of the treatment rendered Mrs. Lavoie constitutes a genuine issue of whether the insurance contract benefits were due and owing to her. In light of such a disputed issue on the contract claim, Aetna argues, the plaintiffs were not entitled to a directed verdict on the contract claim at the close of the evidence. Citing *National Savings Life Insurance Co.* v. *Dutton,* 419 So. 2d 1357 (Ala. 1982), Aetna concludes that since a directed verdict on the contract claim was inappropriate, the Lavoies' bad faith claim should never have been submitted to the jury.

Two of five physicians testifying at trial stated that Aetna's actions in denying the claim were reasonable because the charges in question were not shown to be medically "necessary for the treatment of the injury or disease concerned;" the language contained in the policy exclusion. Nevertheless, Aetna's argument is critically defective in that *at the time of each successive denial Aetna had never once consulted any medical authority.* That Aetna is now capable of creating a fact issue on the contract claim through expert testimony does not, and cannot, belie the fact that Aetna never sought medical consultation, nor

reviewed the treating physician's detailed medical reports, nor reviewed any progress notes before denying an admittedly complicated medical claim. A thousand experts testifying retrospectively could not avert the fact that, without a doubt, Aetna recklessly disregarded the facts and proofs of claim submitted by the Lavoies. *Gulf Atlantic Insurance Co.,* 405 So. 2d at 924.

Herein lies the "extraordinary" nature of this case. In the face of such overwhelming evidence, reasonable men could not disagree, that Aetna was guilty of bad faith, ill-will, oppression and malice in their successive refusals of the Lavoie claim. However, Aetna, through evidence of its own creation, is now capable of raising a factual dispute over the contract claim. To allow Aetna to wholly evade liability through legal artifice under the circumstances of this case would be to reward it for the very conduct which the tort of bad faith was originally recognized to admonish. At some point, some one must declare, "The emperor has no clothes." We take that opportunity today.

Aetna incorrectly reads the case of *National Savings Life Insurance Co.* v. *Dutton,* 419 So. 2d 1357 (Ala. 1982), as requring an application of the directed verdict test in every bad faith case. We do not read *Dutton* in such a restrictive fashion. This court stated in *Dutton:*

> "In the *normal* case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the claim and, thus, entitled to recover on the contract claim as a matter of law. *Ordinarily, if the evidence produced,* by either side *creates a fact issue* with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." (Emphasis added.) *Id.* at 1362.

First of all, nothing in this critical proposition was intended to retract or modify the fundamental concept that an insurance company's bad faith is adjudged by what was before it at the time the decision to deny the claim was made. In fact, this very principle is clearly set out, as well as applied, in *Dutton.* See *Dutton,* 419 So. 2d at 1362. This court found that hospital records, *relied upon by the insurer* in denying Mrs. Dutton's claims, indicated that she had suffered chest pains for two or three years. This was in direct contradiction to Dutton's insurance application, another document relied upon by the insured at the time of the denial.

Second, Aetna has ignored the qualifications placed on the directed verdict test noted above. In his concurring opinion, Justice Jones noted:

> "These are significant qualifications. Certainly, extreme cases will arise in which a fact issue will present a jury question on that claim . . . ." *Id.,* at 1362-63.

This is such an extreme case.

Furthermore, in *Safeco Insurance Co. of America* v. *Sims,* 435 So. 2d 1219 (Ala. 1983), this court held:

> "We are of the opinion that the finding of justiciable controversy is not the determining factor of whether there was or was not bad faith on the part of an insurance company to pay a claim. The standard for testing a bad faith claim is not found in either the adjudication of a justiciable controversy or the *judgment on the merits of the contract claim.* (Emphasis added.) *Id.,* at 1223.

Again, Justice Jones, in his special concurring opinion, amplified the meaning of the majority's quoted language.

> "The standard for testing a bad faith claim is to be found neither in the adjudication of a justiciable con-

> troversy, standing alone, *nor in the judgment on the merits of the contract claim.* This is not to say, of course, that either of these holdings is irrelevant to the bad faith issue. To be sure, the filing of a declaratory judgment action, under appropriate circumstances, may evidence a good faith attempt to seek a prompt resolution of a disputed claim. *If, on the other hand, the refusal to pay is without legal excuse, the mere filing of a declaratory judgment action, followed by a finding of justiciable controversy, may enhance rather than diminish the degree of bad faith.*" (Emphasis added.) *Id.* at 1224.

In commenting directly upon the *Dutton* case, Justice Jones stated:

> "This 'directed verdict on the contract claim' test is not to be read as requiring, in every case and under all circumstances, that the tort claim be barred unless the trial court has literally granted plaintiff's motion for a directed verdict on the contract . . . . Merely because the insurer may be able to withstand a directed verdict motion—the existence *vel non* of the record entry itself being an issue of fact—would not, as a matter of law, bar the plaintiff's tort claim . . . ." *Id.*, at 1225.

A hypothetical raised by the Lavoies illuminates the legal inconsistencies and inequitable consequences which would surely arise should the court adopt, as Aetna suggests, an unyielding, universal application of the directed verdict test. We now offer that hypothetical in a modified form. Assume that an insured submits a valid medical claim to an insurance company in the amount of $20,000. Although the company knew it was contractually obligated to pay the claim, it nevertheless, with malicious and oppressive intentions, decided to deny $15,000 of the claim. In order

to accomplish this, assume that ten employees of the insurance company's medical staff and claims department confederated to create a totally false and absolutely unsubstantiated reason for denying the claim. As litigation over the nonpayment ensued, assume that all ten employees "stuck to their story" in their depositions. At trial however, suppose that nine of the ten employees broke down on the stand, admitting they had lied in deposition, and further agreeing with the plaintiff's contentions that they had indeed engaged in a conspiracy to deprive the plaintiff of his contractual benefits. Nevertheless, assume that the one lone claims superintendent insisted the company had based its denial on a fairly debatable aspect of the insured's claim. Under such a scenario, in light of the scintilla rule, a directed verdict on the contract claim would be inappropriate. Accordingly, under blind adherence to a directed verdict standard, as Aetna recommends, the bad faith claim would never go to the jury.

Such simply cannot be the law. The tort of bad faith had as its genesis the very idea of providing a plaintiff who had been victimized by the intentional, wrongful handling of a claim by the insurer, the right to recover not only contract damages but for the loss occasioned by emotional suffering, humiliation, and embarrassment in addition to punitive damages. The plaintiff's right to recover for the malicious and oppressive denial of a valid insurance claim must not be allowed to rest precariously upon the insurer's ability to *retrospectively* create an issue of fact on the contract claim. As Justice Jones adeptly foresaw and forewarned.

> "The mere filing of a declaratory judgment action, followed by a finding of a justiciable controversy, may enhance rather than diminish the degree of bad faith." *Safeco Insurance Co.*, 435 So. 2d at 1224.

Our findings today, in this narrow context, are likewise consistent with the recent decision of *National Security Fire & Casualty Co.* v. *Vintson,* 454 So. 2d 942 (Ala. 1984). In *Vintson,* this court, citing *National Savings Life Insurance Co.* v. *Dutton, supra,* applied the directed verdict test in determining that the plaintiff's bad faith claim was improperly submitted to the jury. The critical facts presented by that case, however, are clearly distinguishable.

In *Vintson,* the plaintiff alleged that a National Security agent, in an effort to induce the plaintiff to buy fire insurance, represented that the plaintiff's mobile home would be covered from the moment he submitted his application and premium check to the insurance company. Vintson submitted his application and check to the National Security agent who forwarded it to the home office for processing. Shortly thereafter, Vintson's mobile home burned.

At trial, National Security's agent denied making the alleged representations to the plaintiff regarding the time coverage would commence. Consequently, a fact issue concerning the *existence* of the contract itself was created.

Furthermore, evidence presented at trial proved that at the time National Security denied the claim, it had before it the standard application for insurance and that until an application for insurance was approved by the company, and the policy was issued and delivered, no policy of insurance was binding. We concluded that the above facts in and of themselves satisfied the requirement of a debatable reason thereby precluding submission of the bad faith claim to the jury.

In stark contrast to the facts in *Vinston,* here the *existence* of an insurance contract is undisputed. Thus, in addition to all the rights an obligations set out by the contract itself, arises the duty, *implied by law,* to use good faith and fair dealing so as to not interfere with the other party's expectation of performance. *Chavers* v. *National*

Security Fire and Casualty Co., 405 So. 2d 1, 6 (Ala. 1981). See also *Vincent* v. *Blue Cross-Blue Shield of Alabama*, 373 So. 2d 1054, 1060 (Ala. 1979) (Jones, J., concurring specially).

Did Aetna breach this duty in denying the Lavoie claim? The inescapable answer is, yes. As distinguished from the situation in *Vintson*, Aetna failed to follow its own in-house procedures in denying the claim. This court found a debatable reason existed in *Vintson* based upon what was before National Security at the time of the denial and in light of the existing circumstances; specifically a mere *application* for insurance and an in house requirement that an application be approved, a policy issued, and a policy delivered, before coverage was extended. In contrast, it is undisputed that Aetna had before it a complicated medical claim and an in-house requirement that all complicated medical claims be reviewed by the medical department. This it failed to do on four successive occasions.

Moreover, in *Vintson*, as well as in *Dutton*, this court found that based upon what was before the insurance company at the time of the denial, the insurer had no duty to investigate the claim further. In *Dutton*, the insurance company in denying the claim invited the insurer to submit additional medical information. This was not done. A similar invitation was extended by Aetna in this case. Mrs. Lavoie responded on two separate occasions by having her treating physician write Aetna and outline the necessity of her hospital confinement. Aetna, upon receiving this requested information, did nothing. In our view, this is precisely the "reckless indifference to the facts and proofs submitted" which *Gulf Atlantic Life Insurance Co.* v. *Barnes, supra*, originally delineated as reprehensible conduct, in breach of the duty of good faith and fair dealing.

Accordingly, we hold that under the "extraordinary" facts of this case, the bad faith claim was properly submitted to the jury.

II

The second issue raised by the appellant concerns whether Aetna's partial payment of the Lavoie claim, by law, precludes a finding of bad faith refusal to pay. Aetna argues that its payment of some $1,300 of the $3,000 Mobile Infirmary bill constitutes a complete defense to the tort of bad faith. In support of this argument, Aetna relies principally upon *Sexton* v. *Liberty National Life Insurance Co.*, 405 So. 2d 18 (Ala. 1981).

In *Sexton,* this court upheld a summary judgment entered in favor of the defendant, Liberty National Life Insurance Company, on the bad faith refusal to pay count. In doing so, this court noted that the record was wholly devoid of any evidence even tending to show an intentional failure to honor a meritorious claim on the part of the insurer. In reference to the alleged refusal we stated:

> "Having paid a substantial part of the claim, the failure to pay another part could well have been a clerical error . . . ." *Id.*, at 22.

This statement merely highlights the lack of evidence supporting bad faith proffered in *Sexton* and further emphasizes the proposition that a plaintiff must show more than a mere nonpayment, but a bad faith nonpayment. *National Security Fire and Casualty Co.* v. *Bowen,* 417 So. 2d 179, 183 (Ala. 1982). Neither the language cited above, nor any other language in *Sexton* reaches the proposition, gleaned by the appellants, that a partial payment of an insurance claim establishes an absolute defense to a bad faith refusal to pay action.

Likewise, a partial payment and a full payment were respectively considered in *National Security Fire and Casualty Co.* v. *Bowen, supra,* and *Cincinnati Insurance Co.* v. *Little,* 443 So. 2d 9891 (Ala. 1983). In each instance, this court held that bad faith claims were improperly sub-

mitted to the jury in light of the absence of any evidence proving a refusal based on bad faith. While it is true that partial payments may be considered as evidence of a lack of a dishonest purpose or ill-will in an insurer's denial, it does not follow that partial payment, in and of itself, precludes recovery under a bad faith theory. Otherwise, an insurer could avert liability in tort even though the evidence conclusively proved that the insured was the victim of an intentional denial of a portion of a claim which was not otherwise reasonably debatable. In fact, situations may be envisioned where a partial payment is made solely for the purpose of disguising the intentional, oppressive, malicious denial of the remainder of a claim. Under such a scenario the existence of bad faith would be enhanced, rather than diminished.

Under the facts of this case, any inference of the lack of a dishonest purpose afforded Aetna, due to its partial payment, has been crushed beneath the overwhelming weight of evidence proving that Aetna's dealings with the Lavoie claim on four occasions were infected with conspiracy and deceit. Accordingly, the bad faith claim was properly submitted to the jury despite the existence of partial payments made by Aetna.

III

We now turn to whether the jury verdict of $3,501,650.22 is so excessive that it must be set aside.

Gulf Atlantic Life Insurance Co. v. *Barnes,* 405 So. 2d 916 (Ala. 1981), announced that punitive damages were recoverable under the tort of bad faith. In distinguishing between the bad faith conduct which gives rise to compensatory damages as opposed to punitive damages, this court noted:

> " 'It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled

> to exemplary damages. In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice . . . . While we have concluded that defendant violated its duty of good faith and fair dealing, this alone does not necessarily establish that defendant acted with the requisite intent to injure the plaintiff.' . . ." 405 So. 2d at 925 (quoting *Silberg* v. *California Life Insurance Co.*, 11 Cal. 3d 452, 113 Cal. Rptr. 711, 521 P. 2d 1103 (1974).

The purpose behind the imposition of punitive damages is twofold: (1) to punish the defendant for his oppressive, willful acts *and* (2) to warn or deter others in similar businesses from equally reprehensible conduct. *Badgett* v. *McDonald*, 53 Ala. App. 726, 728, 304 So. 2d 228 (Ala. Civ. App. 1974). The imposition of punitive damages in a fraud case is discretionary with regard to both the enormity of wrong and the necessity of preventing similar wrongs. *Ford Motor Credit Co.* v. *Washington*, 420 So. 2d 14, 17 (Ala. 1982). *Carlisle* v. *Miller*, 275 Ala. 440, 155 So. 2d 689 (1963), echoed the guiding rules of review where any jury verdict is challenged as being excessive:

> "It is most platitudinous to restate the guiding rules, but here they are: the verdict of a jury should not be interfered with merely because in the opinion of the court the jury gave too little or too much . . . and the *authority vested in the courts to disturb a verdict of the jury on the ground of excessiveness is one which should be exercised with great caution.* . . . Where, as here, there is no set standard for the admeasurement of damages but the damages to be awarded are left to the sound discretion of the jury, a remittitur or a new trial should not be ordered on the ground of excessiveness of the jury verdict except in those cases where the court can clearly see that the verdict has been reached on account of bias, passion,

> prejudice, corruption or other improper motive or cause . . . and only where the damages allowed are so excessive as to warrant the belief that the jury must have been misled by some mistaken view of the merits of the case should the court interfere and set the verdict aside . . . *also, where the trial court refuses to grant a new trial because he does not believe the verdict is excessive the favorable presumption attending the jury's verdict is thereby strengthened.*" (Citations omitted.) (Emphasis added.) (Cited with approval in *Aspinwall* v. *Gowens*, 405 So. 2d 134 (Ala. 1981).)

After a careful review of the entire record, we cannot conclude that the verdict is so excessive as to warrant a finding that it was based upon bias, passion, prejudice or some other improper motive. The plaintiffs were able to show that the dark shadows of fraud and conspiracy enveloped each and every aspect of Aetna's actions regarding the handling of the Lavoie claim from the instance of the first denial and continued throughout the trial itself.

The evidence presented to the jury justifying such a large verdict may be analyzed in two categories: First, a recitation of the successive denials of the Lavoie claim which grew out of Aetna's oppressive, malicious, willful, fraudulent disregard for the rights of Mrs. Lavoie, and from which a jury could not only impute an intent to injure, but could hardly ignore it; second, an open court demonstration of fraud on the part of Aetna in an effort to evade liability at any cost.

The details of the Lavoie denials have been adequately set out in the foregoing portions of this opinion. Let it suffice to say, however, that the evidence of record supports the following findings:

> (1) Aetna took the position that a woman who was bleeding bright red blood from the rectum, had flight of ideation, was acutely ill, and demonstrated person-

ality changes, should have been treated as an outpatient.

(2) Aetna make its initial denial of the subject claim without any legal justification, and with no medical opinion to support the denial of a complicated medical treatment claim.

(3) Aetna made a second denial without any medical decision whatsoever, in violation of the established company procedure for handling such claims.

(4) Upon receiving medical letters detailing the need for hospital confinement and letter of inquiry from Lavoie's attorney, Aetna decided to wait to see if the Lavoies were going to file suit.

(5) Aetna made a third denial of the claim without any medically qualified opinion to support the denial, again in violation of the company's established procedures.

(6) Aetna intentionally misrepresented to the Lavoies that the claim had been repeatedly reviewed by members of the medical department.

(7) Aetna never had the "most important medical information" available on this file reviewed by any medical doctor during the course of the four denials.

Plaintiffs were successful in unveiling an effort on the part of Aetna to cover-up its wrongdoing. In effect, the jury witnessed an open court demonstration of the type of fraud which Aetna denied so vehemently.

A senior claims processor for Aetna, Brenda Harris, acknowledged at trial, that her deposition testimony of January 1980 unequivocally drew a distinction between Tom Hutton, the senior claims examiner at the home office, and the "Home Office Medical Department." Ms. Harris

admitted at trial that not one time in her deposition did she ever tell plaintiff's counsel that Tom Hutton and the Medical Department were one and the same thing to her.

Nevertheless, plaintiffs read into evidence the sworn affidavit of Ms. Harris, filed by Aetna in support of its initial motion for summary judgment some 35 days after Harris's deposition, which is in direct contradiction to Harris's deposition testimony.

The affidavit reads in part:

> "I understand that an ambiguity may exist concerning my letter of December 23, 1977, to Thomas J. Stein. I stated in that letter that I had again checked with our Medical Department on this matter and they have advised that based on the information available to us, we must continue to deny benefits for the room and board."

Thereafter, in the same affidavit, Ms. Harris notes that she "customarily" refers to the senior claims examiner in Hartford as our "Medical Department."

The jury could have rightfully concluded, and apparently did, that Ms. Harris's affidavit was nothing more than an attempt to cover-up, through deceit, past frauds committed in handling the Lavoie claim.

Likewise, Dr. Swan testified at trial that although he had reviewed "the letter" from Dr. Douglas, it did not contain information warranting a change in the recommendation to deny the claim. Plaintiff's counsel produced an affidavit signed by Dr. Swan, however, indicating that Dr. Swan had never once reviewed any letter from Dr. Douglas.

Lastly, Tom Hutton, a senior claims examiner, originally testified at trial that he had never reviewed the Lavoie file after 20 December 1977; this included the period of time

when the nurses' notes were submitted and when the last claims denial occurred.

On cross-examination, Mr. Hutton was confronted with his sworn testimony in an earlier deposition. In that deposition, Mr. Hutton testified that he reviewed the file in 1978, discussed the review with Dr. Swan, reviewed the nurses' notes, and submitted Dr. Douglas' letters to Dr. Swan. All of the above would have been impossible, if in fact, as Hutton testified, he never reviewed the Lavoie file after 20 December 1977.

We note additionally that the trial judge denied Aetna's motion for a new trial or in the alternative, a remittitur, based on the excessiveness of the verdict. As the trial judge is in a position to judge both the demeanor of the witnesses and jurors, his denial of Aetna's motion must naturally strengthen the jury verdict.

Based upon the foregoing, we cannot conclude the verdict was a result of bias, passion, prejudice, or some other improper motive. Accordingly, it is our duty to leave it undisturbed.

IV

The final argument raised by the appellant concerns whether testimony regarding the Lavoies' financial condition was impermissibly allowed into evidence.

Aetna argues the following questions were not relevant and that their admisison served only to raise the passion and bias of the jury:

> "Q: What was your total family income, you and your wife from Social Security and your disability and your wife's disability in February of 1977?
>
> "MR. CUNNINGHAM: Your Honor, that's not relevant at all. As to what his income is has nothing to do with the material involved in this lawsuit.

"MR. CROWDER: Your Honor, it's very relevant.

"THE COURT: Overrule the objection."

Mr. Lavoie went on to testify that his total income for that month was $700. On a second occasion Mr. Lavoie was asked:

"Q: Well, Mr. Lavoie, why didn't you just go ahead and pay the bill from the Infirmary and wait and see how the outcome of this would be?

"A: Because I didn't have the money."

The test of relevancy applied in Alabama is whether the offered evidence bears any logical relationship to the ultimate inference for which it is offered. C. Gamble, *McElroy's Alabama Evidence* § 21.01 (3d ed. 1977). The inference for which the evidence is offered, of course, must be material to an issue in the case. *Ex parte Killough*, 438 So. 2d 333, 335 (Ala. 1983).

In the case at hand, plaintiffs may properly recover compensatory changes for economic loss and mental distress. *Gulf Atlantic Life Insurance Co.* v. *Barnes*, 405 So. 2d 916, 925 (Ala. 1981); *Chavers* v. *National Security Fire & Casualty Co.*, 405 So. 2d 7 (Ala. 1981). In support of their theory of recovery, the plaintiffs offered proof that the bad faith refusal to pay the amount due for medical care to the Mobile Infirmary resulted in the plaintiffs' receiving collection letters and threats of suit from the Mobile Infirmary, a collection agency, and an attorney. All of this contributed to and caused the plaintiffs to suffer extreme emotional distress.

It is axiomatic that the law imposes a duty upon all plaintiffs to mitigate their damages. *Britton* v. *Doehring*, 286 Ala. 498, 507, 242 So. 2d 666 (1970). We find the evidence in question to be admissible in order to show that the Lavoies were incapable of paying the Mobile Infirmary

bill with their own finances, and thereby reducing the emotional distress caused by hounding creditors.

Accordingly, there appearing no error in the record, the judgment of the trial court is due to be, and it is hereby, affirmed.

AFFIRMED.

Faulkner, Jones, Almon, Embry and Adams, JJ., concur.

Torbert, C. J., Maddox, Shores and Beatty, JJ., dissent.

TORBERT, CHIEF JUSTICE (dissenting).

The tort of bad faith breach of an insurance contract was judicially created to fill a remedial void. Had it not been for the lack of adequate contractual damages, the need for this tort in the insurance context (and it thus far has been restricted to insurance in Alabama) would not have arisen. Traditionally, contract damages for breach of an insurance policy were limited by the classic case of *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854), to the face value of the insurance policy plus the legal rate of interest. Consequential damages for personal injuries, inconvenience, annoyance, loss of job or business, or mental anguish and suffering were not recoverable *ex contractu,* such damages being viewed as unforeseeable and not within the contemplation of both parties at the time of contract formation. This rule excluding consequential damages is still followed in non-insurance contexts in Alabama today. See, *Jefferson County Burial Society v. Curry,* 237 Ala. 548, 187 So. 123 (1939); *Stead v. Blue Cross-Blue Shield of Alabama,* 346 So. 2d 1140 (Ala. 1977). Of course, punitive damages are disallowed, as well.

In severely limiting contractual damages to the face value of the policy plus the legal rate of interest, the law created an incentive for insurers to refuse payment of even legitimate claims. The insurers had nothing to lose, and

everything to gain, by refusing payment of even meritorious claims. At most, the assessed damages would equal the limits of the policy plus the legal rate of interest (sometimes far below the actual market rate). Any tangible consequential economic damages, such as loss of job or bankruptcy, and intangible damages, such as emotional distress, were borne entirely by the insured, on the basis that certainly they were not within the contemplation of the bargain of the parties. Consequential losses were allowed to lie where they fell, even in the case of intentional breach of contract.

If I were writing on a clean slate, yet enlightened by foreseeing the results of this Court's recognition of the tort of bad faith, I would be inclined to argue for an expansion of the damage rules in contract rather than creation of a new tort. There are several advantages to confining first-party insurance cases to the field of contract law, with an expansion of the damages remedy.

Contractual duties are consensual, and even when implied they have the virtue of implication from the contract itself. There are well-established rules for determining a breach and its consequences. Contracts is perhaps the most concrete and predictable body of legal doctrine, whose application is unlikely to defeat any valid expectation interests of the parties; this is certainly important in the insurance context, where predictability, at least of the statistical variety, is necessary in calculating premiums. Finally, judicial control of the excesses of passionate juries is less problematic in contracts than it is in the realm of torts. In contracts, the important issues are more often legal than factual, and any modification of damage rules would not require the availability of punitive damages.

In contrast to the virtues of contract law in general, and to a mere modification of contract damage rules in particular, the creation of any new tort is fraught with dis-

advantages, as our recent experience with the insurance-specific tort of bad faith demonstrates.

The duties recognized in tort are non-consensual, imposed from without, either because of a special relationship between the parties or because of perceived public policy implications. Such duties are of necessity amorphous, becoming in application little more than matters of degree, best suited to resolution by a jury. Tort duties are difficult to judicially define or confine; although most courts are content with the enuciation of standards, such as "reasonable care," in defining tort duties, wherever courts enunciate particular concrete rules, the process becomes endless, with attempts to cover each fact situation specifically as it arises, ultimately causing more confusion than clarity as the specific rules inevitably conflict.

Determining whether the breach of a tort duty has occurred is almost as problematic and fluid as is the initial definition of the duty. Unlike contracts, the comparative advantage in making this determination lies with the jury, and not the judge. Because tort cases are so fact-intensive and the liability rules so amorphous, the results at trial are unpredictable and often inconsistent, an especially undesirable consequence in the insurance context. Finally, in tort the scope of liability is much broader than in contract, especially with respect to intentional torts. Almost all damages proximately flowing from the cause are recoverable; and, of course, punitive damages are recoverable in the appropriate aggravating circumstances. This problem of excessive and even spurious damage awards could have been, and still can be, obviated by simply restricting the cause of action to contract and carefully expanding the contractual damages rules for non-commercial insurance contracts.

The foundation for such a carefully crafted expansion has already been laid in Alabama law. As already noted in

Stead, supra, consequential damages have been viewed unfavorably in Alabama in recent years in breach of insurance contract cases, due to the fact that they were "too remote, were not within the contemplation of the parties, and [the fact] that the breach of contract is not such as will naturally cause mental anguish." *Stead, supra,* at 1143, citing *Westesen v. Olathe State Bank,* 78 Colo. 217, 240 P. 689 (1923).

Yet, certain exceptions to this general rule have long been recognized in Alabama and around the country. As quoted in *Southern Ry Co. v. Rowe,* 198 Ala. 353, 73 So. 634 (1915), and repeated in *Stead, supra,* at 1143, ". . . where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of the duty will necessarily or reasonably result in mental anguish or suffering, it is just that damages therefore be taken into consideration and awarded."

Certainly an insurance contract is not an ordinary commercial contract for profit in which mental distress damages are unforeseeable. The insured does not bargain for a profit; instead he bargains for compensation in time of catastrophe and for peace of mind. In this sense, an insurance contract is more akin to contracts of carriers and innkeepers, for which consequential damages have long been recognized due to the personal nature of the service. A particularly likely risk of breaching an insurance contract is resulting impoverishment or bankruptcy. Coupled with the fact that such breaches almost always coincide with emotional vulnerability (death, health problems, or destruction of a business or home), a very strong case can be made for awarding consequential damages for financial loss and even for emotional disturbance. See, *Restatement (Second) of Contracts,* § 353, comment a (1982). Insurers, in effect, sell freedom from care and worry, and should be held to foresee the consequential damages flowing from

their breach. Several cases in other jurisdictions have flirted with this approach. See, *Reichert v. General Ins. Co. of America,* 68 Cal. 2d 822, 849, 69 Cal. Rptr. 321, 337 (1968) (dissenting opinion); *Miholevich v. Mid-West Mut. Auto. Ins. Co.,* 261 Mich. 495, 246 N.W. 202 (1933); see also, K. Harvey and T. Wiseman, *First Party Bad Faith: Common Law Remedies and a Proposed Legislative Solution,* 72 Ky. L.J. 141 (1983-84).

Alabama courts have recognized that contracts dealing with new home construction are a special category, falling within the exception to the general damages rule, allowing recovery for mental anguish and annoyance and inconvenience, as well as other consequential damages deemed foreseeable. *B & M Homes, Inc. v. Hogan,* 376 So. 2d 667, 671 (Ala. 1979). The case is even stronger for creating such an exception for insurance conracts. Consequently, recent cases denying such damages for breach of insurance contracts should be overruled. See *Sanford v. Western Life Ins. Co.,* 368 So. 2d 260 (Ala. 1979); *National Sec. Fire & Cas. Co., Inc. v. Vintson,* 414 So. 2d 49 (Ala. 1982) (consequential damages denied).

By making it attractive to sue alternatively, or even exclusively, in contract, this Court could have avoided many of the problems associated with developing a new tort. As an added benefit, much of the appellate workload would be reduced in reviewing excessive jury awards of punitive damages, since punitive damages are not available in contract.

The whole question of bad faith by insurance companies might be an issue more properly addressed by the legislature. The existing regulation of the insurance industries is a public-policy recognition by this state that consumers need some protection in this field. A proper balance between the two competing policy objectives inherent in claims of first-party bad faith must be struck.

> "The first objective recognizes that an insured's cause of action for first party bad faith should entitle him to damages promised under the policy, and consequential damages 'within the contemplation of the parties.' The second public policy implicated by first party bad faith is that the risks of excessive judgments should not be so unreasonable that they discourage insurers from challenging claims that are at least fairly debatable. Any effective resolution of the problem must address these two policy goals.
>
> "The difficult questions raised by first party bad faith require a careful balancing of the competing interest. Unfortunately, the courts, restrained by principles of common law formulated to solve different problems, have found it difficult, and sometimes impossible, to achieve a workable balance. . . . Because of the failure of the common law to provide an effective resolution, a legislative solution is appropriate. The legislative forum can provide for the consideration and debate of all viewpoints, resulting in a proper balance."

K. Harvey and T. Wiseman, *supra,* at 190 (see also the statute proposed by the authors in the appendix at p. 195).

However, this is all water under the bridge for now, so we must struggle to manage what has come to be the unmanageable.

Chavers I established that there was a duty to use good faith and fair dealing so as to not to interfere with the other party's expectation of performance in an insurance contract. *Chavers v. National Security Fire and Casualty Co.,* 405 So. 2d 1 (Ala. 1981). An insurer will breach that duty if it intentionally refuses to settle a direct claim where there is either no lawful basis for the refusal, coupled with actual knowledge of that fact, or intentional failure to determine whether or not there was any lawful basis for such refusal. *Id.* at 7.

In the cases since *Chavers I* we have attempted to refine and clarify the *Chavers I* test. In *Gulf Atlantic Life Insurance Co. v. Barnes,* 405 So. 2d 916 (Ala. 1981), this Court said:

> "The first tier of the test promulgated by Mr. Justice Embry and adopted by this Court in *Chavers* establishes that the tort of bad faith refusal to honor a direct claim arises when there exists 'no lawful basis for the refusal coupled with actual knowledge of that fact.' 'No lawful basis,' as expressed in that opinion, means that the insurer lacks a legitimate or arguable reason for failing to pay the claim. See *Michael v. National Security Fire & Casualty Co.,* 458 F.Supp. 128 (N.D. Miss. 1978). That is, when the claim is not fairly debatable, refusal to pay will be bad faith and, under appropriate facts, give rise to an action for tortious refusal to honor the claim. *Anderson v. Continental Insurance Co.,* 85 Wis. 2d 675, 271 N.W.2d 368 (1978). When a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. 'Coupled with actual knowledge of that fact' implies conscious doing of wrong. Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, [*i.*]*e.,* good faith and fair dealing, through some motive of self-interest or ill will.
>
> "The second tier of the test is an elaboration on the first. The trier of fact, by finding, on the part of the insurer, an 'intentional failure to determine whether or not there was any lawful basis for refusal,' may use that fact as an element of proof that no lawful basis for refusal ever existed. The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the conclusion that the

knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured. Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith. Otherwise, the insurer's knowledge of the non-existence of any debatable reasons for refusal would be a question for the finder of fact, *i.e.*, the jury."

In *National Security Fire and Casualty Co. v. Bowen*, 417 So. 2d 179 (Ala. 1982), the elements of an action for bad faith which a plaintiff must prove were stated as:

"(a) an insurance contract between the parties and a breach thereof by the defendant;

"(b) an intentional refusal to pay the insured's claim;

"(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);

"(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;

"(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."

In *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982), we said that normally in order for a plaintiff to make out a prima facie case of bad faith,

"the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim

> and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury."

In *Dutton* and *National Security Fire and Casualty Co. v. Vintson*, 454 So. 2d 942 (Ala. 1984), we said that once the insurer establishes a debatable basis for denying a claim it has no affirmative duty to investigate further.

In light of these refinements in the law, I believe it is useful to re-evaluate the dimensions of the tort. Justice Embry in his dissent in *Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So. 2d 1054 (Ala. 1979), set forth the policy considerations mandating recognition of the tort of bad faith:

> "Public policy favors the free exercise of rights arising from a contract by the parties to it.
>
> "However, this is not to say that an insurer may in bad faith breach his contract with impunity. The law will not allow an insurer to wilfully refuse to evaluate or honor a claim with the knowledge that the avowed purpose of the insurance contract was to protect the insured at his weakest and most perilous time of need."

As this statement points out, the law should not sanction the intentional conduct of an insurer in either refusing to pay a claim knowing no debatable reason exists for not doing so or simply sitting back and taking no action on the claim. In effect the duty of good faith and fair dealing requires that if an insurer does not pay the claim there must be a debatable reason for not doing so.

When this Court actually "breathed life" into the tort in *Chavers I*, we attempted to define bad faith to encom-

pass either of the evils described above. The first tier of the *Chavers I* standard recognized that an insurer acted in bad faith when it intentionally refused to pay a direct claim knowing that no lawful basis existed for that refusal. Although implicit in *Chavers I, Bowen* held that the plaintiff must prove the lack of a debatable reason. *Bowen* at 183. The second tier of the *Chavers I* standard, the intentional failure to determine the existence of a lawful basis for denying the claim, addresses the second evil, that is, failure to act on the claim. The second tier of the *Chavers I* standard makes it clear that an insurer acts at its peril if it fails to process the claim.

As stated by Justice Beatty in *Barnes,* the second tier is an elaboration on the first. That is, the second tier is also a method by which the insured can circumstantially prove that no debatable reason existed when the claim was denied because the insurer had not investigated the claim. But as *Barnes* also points out, if a debatable reason for denying the claim actually exists, "the insurer, as a matter of law, can not be held liable in an action based upon the tort of bad faith." *Barnes* at 924.

The focusing of the inquiry in bad faith claims on whether there is a debatable reason for denying the claim and generally away from the conduct of the insurer in investigating and evaluating the claim does not mean the law condons an insurer's conduct in not properly investigating and evaluating the claim. It stems from the recognition that without a threshold determination that the insurer had no debatable reason for denying the claim, the insured was in essence not injured, for the insured had no right to immediate payment of the claim.[1] No matter how badly

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[1] The decisions in *Prudential Ins. Co. v. Coleman,* 428 So. 2d 593 (Ala. 1983), *Dutton,* and *Vintson* illustrate that it is the existence or non-existence of the debatable reason that is critical and that once that is established questions of whether the claim was properly investigated and evaluated are essentially moot.

the insurer acted in investigating and evaluating the claim, if there was a debatable reason for refusing to pay the claim, when payment was refused, the insured was not entitled to prompt payment. If a debatable reason exists, the insurer has the "freedom (and, perhaps, the duty) not to honor, and thus legally dispute, claims of questionable validity." *Chavers I* at 6 (quoting from Justice Jones's special concurrence in *Vincent*). The lack of proper investigation and evaluation is significant in proving another element of the tort, namely *knowledge* by the insurer of the lack of a debatable reason. *Barnes* at 924.

Dutton established that if the plaintiff was able to show the insurer lacked a debatable reason for denying the claim, plaintiff would ordinarily be entitled to a directed verdict on the contract claim, and therefore in the normal case a directed verdict on the contract claim was necessary to make out a prima facie case of bad faith. However, as the majority opinion in the present case points out, the conduct of the insurer is to be judged at the time of the denial, based upon the information the insurer had at that time. *Bowen* at 183; *Dutton* at 1362; *Wilkins* at 10. Thus, the *Dutton* test might be more accurately stated as follows: in the normal case the plaintiff should have been entitled to a directed verdict on the contract claim if the directed verdict determination was made on the basis of what had happened at the time of the denial.

I turn now to an examination of the facts in this case to determine whether at the time each denial was made there was a debatable reason for denying the claim.

On March 3, 1977, the hospital completed the appropriate forms and forwarded them along with a "History and Physical Summary," a "Discharge Summary," the physician's progress notes, and various other data, such as the consultation on the EKG, to the Aetna office in Mobile. Included was a bill for $3,028.25. The summaries stated:

"HISTORY AND PHYSICAL SUMMARY

"This 54 year old lady has been followed in the past for mechanical low back pain and osteoarthritis. She had not been seen in our office in about 3 years. She came in with the interval history that she had been retired for 2 years, that her arthritis had become more active over the last several months and she was having generalized arthritis pains in her back, neck and all extremities particularly in the hips, left knee and around the pelvic area. She complains of being very nervous. She said that she has been noticing some intermittent bleeding from the bowel and has a past history of diagnosis of chronic ulcerative colitis. Because of the general exacerbation of her arthritis and the apparent exacerbation of her ulcerative colitis, she is admitted at this time for evaluation and treatment.

"PAST HISTORY: She had gall bladder surgery in 1970, a fibroid tumor removed in 1946 and an exploratory laparotomy in 1953. She has a history of a couple episodes of pnemonia [sic] but denies history of peptic ulcer, hepatitis, rheumatic fever, diabetes or hypertension. She has a questionable history of glaucoma, does not know the severe state of it. She has had episodes of chest pain in the past, about 4 years ago, none recently. No diagnosis or EKG's were done at the time of the pain.

"FAMILY HISTORY: Positive for hypertension and she has a brother who had 1 episode of what was called inflammatory arthritis as a child. No family history of cancer, diabetes or early heart disease.

"DISCHARGE SUMMARY

"54-year-old white female who was admitted with an abdominal pain, osteoarthritis and mechanical low

back pain. She had not been seen in my office for three years when she came in because of general aching and particularly saying that she had had intermittent bleeding from the bowel and had a past diagnosis of chronic ulcerative colitis. We are unable to substantiate this diagnosis in the hospital. In fact, she had a negative GI workup. Her musculoskeletal complaints while she does have some normal amount of osteroarthritis varying from place to place for her age, it is not really outstanding and her general situation suggests that she considerable [sic] psychogenic overlay to her somatic symptoms, and therefore, they are somewhat exaggerated. She has been placed on Mellaril in depth. She has shown some suggestion of slight improvement in the hospital but continues to somaticize her symptoms rather vigorously. It has been explained to her that this is primarily a nervous problem and we have mentioned that she may need the help of a psychiatrist if she does not continue to improve following discharge.

"DISCHARGE DIAGNOSIS: OSTEOARTHRITIS,
MILD PSYCHOPHYSIOLOGIC REACTION
MANIFESTED BY ABDOMINAL PAIN."

The supervisor of the Mobile office of the insurer, Alice Murphy, sent a request to the hospital for further information on March 24, 1977. This letter in pertinent part reads:

> "It would be greatly appreciated if you would send complete hospital records including, admitting and discharge summary, nurses and physicians notes."

On April 5, 1977, before receiving anything further from the hospital, Brenda Harris, a claims worker for Aetna, forwarded the information she had from the hospital to Jean Becker, a "Senior Claims Examiner," in Aetna's

office in Hartford, Connecticut. To the information forwarded, Harris appended a memorandum stating:

> "In our opinion a 23-day confinement for the diagnosis was not necessary. Hospital records do not indicate anything to the contrary."

In pertinent part, Aetna's response reads:

> "DATE: April 27, 1977
>
> ". . . .
>
> "This file has been reviewed with a member of the Medical Dept. On the basis of the limited information submitted, the confinement does not appear to have been medically necessary. We feel this patient could have been evaluated and treated on an out-patient basis.
>
> "Several of the X-ray and lab procedures performed are not usual and customary for the diagnosis given. These include the CAT Scan, EEK and EKG. Since the City of Mobile policy clearly limits coverage to services and supplies which are reasonably necessary for the diagnosis and treatment of nonoccupational disease or injury, room and board charges as well as the aforementioned miscellaneous charges must be denied. Thank you."

The Lavoies received notification, by a letter from Harris, on June 3, 1977, which reads in full:

> "After having this file reviewed by our Medical Department we must, at his time, deny benefits for room and board charges.
>
> "From the information we submitted to them it appears the evaluation and test could have been performed on an out-patient basis. Also, we must deny charges for the CT Brain Scan, EEG and EKG since

they are not usual and customary procedures for the diagnosis given.

"If you have any questions please feel free to contact this office."

The defendant then paid the hospital for the medical diagnostic tests, other than the EEG, EKG, and CAT scan, physical therapy and a back brace. Dr. Douglas was paid $300.20 and the Lavoies were paid $217.34 directly. The parties stipulated the remainder on the claim was $1,650.22.

Under the insurance policy Aetna was only bound to pay for expenses arising from treatments, procedures, etc., that were medically necessary. The denial of payment of some of the expenses was on the basis that Aetna decided some expenses were not medically necessary. Was it reasonably debatable *at that time* that the denied expenses were medically necessary? Under these facts, I think not.

There is credible evidence from which the jury could conclude that the Lavoies' claim was never reviewed by Aetna's medical department. The fact that it is debatable whether the claim was reviewed by the medical department is not the sort of factual controversy that is sufficient to defeat a bad faith claim. When the facts which create a debatable reason emanate from the insurer, a blind adherence to the directed verdict rule would essentially abolish the tort. See *Safeco Ins. Co. v. Sims,* 435 So. 2d 1219 (Ala 1983) (Jones, J., concurring specially). If, in fact, the claim was not reviewed by the medical department, what facts would allow Aetna to say it was debatable whether the expenses were medically necessary? While I am not prepared to say that under no circumstances would an experienced claims examiner be able to determine that certain medical expenses were medically unnecessary, there is no evidence that the examiners who handled this claim had the experience to do so nor that they made the decision based upon their own experience. In fact, the testi-

mony here indicates that the examiners knew that medically trained personnel needed to review the claim. Therefore, I conclude that at the time Aetna first denied the claim it had no debatable reason for doing so.

However, it is interesting to note that this appears to be a case where the insurer thought there was a debatable reason for denying the claim and could have established one, and did establish one after the first denial. Dr. Swan apparently did review the Lavoie file before the second denial was made. At that point, assuming that there was no evidence that Dr. Swan lied, Aetna established credible medical evidence that the expenses did not result from medically necessary procedures. Expert testimony at trial supports Dr. Swan's initial determination.

While Aetna's conduct in reviewing the claim after the initial denial was questionable, I believe that Aetna was justified in denying the claim based upon the advice of Dr. Swan.[2] Establishing a debatable reason for denying the claim after the initial denial forecloses any determination that the subsequent refusals to pay were made in "bad faith", in the absence of new information eliminating the debatable reason at the time of those refusals.

However, it is not sufficient simply to find that no debatable reason exists for refusing to pay the claim. The plaintiff must also show that the insurer *knew* that no debatable reason existed. *Bowen, supra.* Here the testimony shows that Brenda Harris questioned the propriety of a 23-day hospital stay and thought it was medically unnecessary. Apparently Jean Becker, the senior claims examiner who actually denied the claim, believed that the expenses were not medically necessary. While the knowledge element

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[1] While there is controversy concerning exactly what materials were in the Lavoie file when reviewed by Dr. Swan, the expert evidence offered at trial was to the effect that even if everything available to Aetna was in the file there was still a debatable question as to whether all procedures were medically necessary.

of the tort, like any mental state requirement in any tort, almost always must be proved circumstantially, I am unable to find any evidence that would authorize a jury to find that Aetna knew no debatable reason existed. In fact, the evidence supports the conclusion that Aetna thought, and, as it turns out, was correct in thinking, that a debatable reason did exist and therefore that denial of the claim was proper.

I conclude that while the Lavoies proved that initially there was no debatable reason for denying the claim, they did not prove that Aetna knew there was no debatable reason for denying the claim, and therefore the judgment for them on the bad faith claim should be reversed.

Beatty, JJ., concurs.

MADDOX, JUSTICE (Dissenting).

Admittedly, the facts of this case are such that it would appear from the facts set out in the majority opinion that the insurer was guilty of a bad faith refusal to pay an insurance claim, but when the basic facts necessary to a resolution of this case are examined against the rule of law established in bad faith cases, it is apparent that the insureds were not entitled to recover on the bad faith claim, because they failed to meet their burden of showing that the insurer "had no legal or factual defense to the insurance claim." *National Security Fire & Casualty Company v. Vintson,* 454 So. 2d 942 (Ala. 1984).

In *Vintson,* in which the Chief Justice and every Associate Justice concurred, except Justice Faulkner, who concurred in the result, this Court reviewed the law of bad faith refusal to pay an insurance claim, and concluded that when a claimed misrepresentation by a company agent presents a jury question, a "debatable reason" exists for denying liability on a bad faith claim. Because *Vintson* is the latest expression of the law of bad faith refusal to pay an insurance claim, and because every member of

this Court concurred in the opinion or the result reached in the opinion, I believe it would be instructive to quote extensively from that opinion, because the facts in this case are not so dissimilar that a different result should be reached here from what was reached in that case. There, the Court opined:

> "Before we consider whether the denial of the directed verdict was proper under the specific facts of the present case, we look first at the evolution of the tort of bad faith refusal to pay a direct insurance claim in this state. This Court stated in *Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1, 7 (Ala. 1981):
>
> > "'[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either "(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) *intentional failure to determine whether or not there was any lawful basis for such refusal.*"' (Emphasis added.)
>
> "Later, in *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982), we held:
>
> > "'No lawful basis "means that the insurer lacks a legitimate or arguable reason for failing to pay the claim." *Gulf Atlantic Life Ins. Co. v. Barnes*, Ala., 405 So. 2d 916 (1981). When a claim is "fairly debatable," the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. *Ibid.*
>
> > "'Under those authorities the plaintiff in a "bad faith refusal" case has the burden of proving:
>
> > "'(a) an insurance contract between the parties and a breach thereof by the defendant;

"'(b) an intentional refusal to pay the insured's claim;

"'(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);

"'(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;

"'(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

"'In short, plaintiff must go beyond a mere showing of nonpayment and prove a *bad faith* nonpayment, a nonpayment without any reasonable ground for dispute. Or, stated differently, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim. [Emphasis in original.]

"'The "debatable reason" under (c) above means an arguable reason, one that is open to dispute or question. Webster's Third New International Dictionary (1931) at 116. See *Chavers* at 10; see also Embry, J., concurring on rehearing in *Aspinwall v. Gowens*, Ala., 405 So. 2d 134 (1981).'

"More recently in *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982), this Court emphasized the heavy burden that a plaintiff must bear in a bad faith case. *Dutton, supra*, held:

"'In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed

> verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidene produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.' 419 So. 2d at 1362.
>
> "*Dutton* also stated that '[w]hether an insurance company is justified in denying a claim under a policy must be judged by what was before it at the time the decision is made.' "

Vintson, supra, at 944.

In *Vintson,* the insured had claimed that an agent of the insurer had told him he had fire insurance coverage, and the insurer had later denied that there was coverage. Because of this dispute between the insurer and the insured, this Court, in *Vintson,* held that "[t]here was conflicting testimony concerning [a] conversation between Vintson [the insured] regarding the time that the policy would take effect," and held that the insured failed to establish a bad faith failure to pay an insurance claim.

In this case, the crucial factual question was whether the 23-day hospital confinement and the diagnostic tests were reasonably necessary in view of the discharge diagnosis, which without question read:

"OSTEOARTHRITIS, MILD
PSYCHOPHYSIOLOGIC
REACTION MANIFESTED
BY ABDOMINAL PAIN."

The insurer concedes that the insureds made out a *prima facie* case on their contract claim, but they do not concede that the insureds met their burden of showing that they were entitled to recover on the contract claim as a

matter of law; consequently, they contend that the insureds failed to show they were entitled to a directed verdict on their contract claim. The insureds agree with the insurer in this contention.

They candidly admit that the evidence was conflicting on whether the 23-day hospital stay, the EKG, EEG, and CAT scan were, without question, medically necessary, but they contend that what they describe as the "physician war" which occurred at the trial of the case was merely a "side show" and was put on by the insurer "to obscure, for both the jury and the judge and for this Court on appeal, those acts of fraud, conspiracy and intentional deceit perpetrated upon its insured during the course of its handling of the claim." They claim that they proved that the insurer intentionally violated its own in-house procedures for the handling of claims, intentionally refused to review the most important medical information which could be submitted in a given case (the treating physician's narrative report), intentionally lied to its insureds, intentionally engaged in cover-up activities in an attempt to "whitewash" its conduct, intentionally committed perjury during the course of discovery connected with the case on the most critical issues involved in the case, and intentionally refused to obtain the nurses' notes during the course of its four reviews of the claim. The majority believes that proof of these facts, if believed by the jury, would authorize the recovery against the insurer of $3.5 million in punitive damages. I do not agree, because I cannot classify the conduct by the insurer's agents in this case to be any more reprehensible than the conduct of the insurer's agent in *Vintson*.

Admittedly, there was evidence that at the time the insurer initially denied the claim and stated that the claim had been reviewed by a member of the "medical department," that, in fact, it had not been reviewed by a member of the insurer's medical department; admittedly, there was

evidence that the Mobile claims representative had stated in a letter to an attorney for the insureds that she had checked with the insurer's "Medical Department," when, in fact, she had only checked with the senior claims representative; admittedly, there was evidence that the senior claims representative, Hutton, had given testimony in a deposition which was in conflict with testimony given by him during the trial of the case; admittedly, there was conflicting evidence regarding the date when the claim was reviewed by the medical department. The insureds contended that the evidence supported a finding that the review by the medical department was on April 28, 1977, the day after the denial of the claim, instead of April 25, 1977, as testified to by a witness for the insurer; and, admittedly, there was conflicting evidence whether the treating physician's narrative report was ever in the insurer's home office file.

Even assuming, however, that each of the insureds' contentions was proven to the reasonable satisfaction of the jury, the crucial issue in this *bad faith* case, as it is in every bad faith case, is whether the insureds showed that the insurer "*had no legal or factual defense to the insurance claim.*" (Emhasis added.) *Vintson, supra.* I believe that the insureds failed to meet the burden of proof as required by *Vintson.* Two of the five doctors testifying at the trial stated that the insurer's actions in denying the claim were reasonable because the charges in question were not shown to be medically "necessary for the treatment of the injury or disease concerned," which was the language of the policy exclusion.

Based on the evidence presented, and applying the law of bad faith as I understand it to be spelled out in *Vintson,* I can only conclude that the insureds failed to meet their burden of showing that the insurer "had no legal or factual defense to the insurance claim." *Vintson, supra.*

I realize that the evolution of the tort of bad faith has been difficult, and that the Court has expressed differing views on the standards to be used by the bench and bar in determining when and under what circumstances the tort was established, but in *Vintson,* this Court clearly established these principles in a succinct and understandable opinion. The principles of law laid down in that decision should be applied in this case; consequently, I must respectfully dissent.

There is an additional reason why the claim for bad faith refusal to pay should not be allowed in this action. The insurer promptly paid a portion of the claim, but denied that portion of the claim which it deemed not covered by the terms of the policy. This partial payment made under the policy, in my opinion, is an additional fact which precludes a finding of bad faith refusal to pay in this case. *Sexton v. Liberty National Life Ins. Co.,* 405 So. 2d 18 (Ala. 1981); *National Security Fire & Casualty Co. v. Bowen,* 417 So. 2d 179 (Ala. 1982).

In each of those cases, this Court concluded that, because the insurer had paid a portion of the claim, there was no refusal to pay, and that the insured in each case had failed, therefore, to prove a prima facie case of bad faith refusal to pay. Similarly, in *Cincinnati Ins. Co. v. Little,* 443 So. 2d 891 (Ala. 1983), this Court addressed the legal effect of a partial payment when the issue of a bad faith refusal to pay a claim is at issue.

I do not suggest that partial payment by an insurer of a claim would preclude a finding of bad faith refusal to pay in every case; otherwise, an insurer could escape liability for tort, even though the evidence might show that the insured was a victim of an intentional denial of a claim which was not otherwise reasonably debatable;[1]

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[1] Cf. *Berry v. United of Omaha,* 719 F. 2d 1127 (11th Cir. 1983) (applying Alabama law; full payment of claim prior to suit

however, in this case, the payment of a "substantial" portion of the claim under the policy is consistent with insurer's claim of good faith denial of the remainder.

Assuming, arguendo, that the insureds did prove their claim for bad faith refusal to pay, I am of the opinion that there is no justification to support an award of punitive damages in the sum of $3,500,000. In *Gulf Atlantic Life Ins. Co. v. Barnes,* 405 So. 2d 916 (Ala. 1981), this Court found that a judgment rendered against an insurance company in the amount of $1,100,000 was "excessive and obviously the result of passion and prejudice on the part of the jury." In *Barnes,* this Court directed the trial court to require a remittitur in the amount of $1,000,000 as a condition to the denial of a new trial.

In *Johnson Publishing Co. v. Davis,* 271 Ala. 474, 124 So. 2d 441 (1960), this Court found a jury verdict awarding plaintiff $67,000 was excessive; there, this Court directed a remittitur of all but $45,000 of the judgment as a condition for affirming the judgment.

Based on the above, I am of the opinion that the verdict of the jury awarding the insureds $3,500,000 is excessive and if the judgment below is to be affirmed, this Court should direct a remittitur.

Shores, J., concurs.

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is not a defense if the initial refusal to pay was made in bad faith). *See also* Blan, *The Tort of Bad Faith—A Defense Viewpoint,* 34 Ala. L. Rev. 543 (1983), Heninger, *Bad Faith in Alabama: An Infant Tort in Intensive Care,* 34 Ala. L. Rev. 463 (1983).

APPENDIX B

82-426 & 82-1152

AETNA LIFE & CASUALTY CO., INC.

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.

ON MOTION FOR DISQUALIFICATION AND APPLICATION FOR REHEARING

[Filed Mar. 8, 1985. Clerk, Supreme Court of Alabama]

PER CURIAM.

Pending appellant's application for rehearing, the appellant has filed a motion in this cause styled "Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984, and for Hearing De Novo."

Upon consideration, the Court is of the opinion that under the allegation of said motion in this case each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each justice having voted not to recuse,

IT IS, THEREFORE, ORDERED that the "Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984, and for Hearing De Novo" be, and the same is hereby, denied.

Faulkner, Almon, Embry, Beatty, and Adams, JJ., concur.

Tolbert, C. J., and Maddox, Jones, and Shores, JJ., concur specially, with opinions by Torbert, C.J., and Maddox, J.

APPLICATION FOR REHEARING OVERRULED.

Faulkner, Jones, Almon, Embry, and Adams, JJ., concur.

Torbert, C. J., and Maddox, Shores, and Beatty, JJ., dissent.

TORBERT, CHIEF JUSTICE (concurring specially as to the ruling on the motion for disqualification).

I am in accord with the views expressed herein by Justice Maddox with respect to the issue of whether the Court as a body, or the individual justices, should make the determination as to the disqualification of one or more of its members. I agree on the basis of the American Bar Association standards cited; but more importantly, the alleged disqualification here is more subjective than objective, as would be the case where a judge is related to a party or counsel or where a judge has a direct financial interest in the outcome of litigation. The question of disqualification under the factual assertions of appellant's motion addresses itself to the ethical judicial conscience of each justice applied in accordance with the established rules of law set forth in the opinion by Justice Maddox.

Appellant contends that I am disqualified because I "may have an interest as a possible class member plaintiff in the circuit court action filed by Justice T. Eric Embry and as such [have] an interest that could be substantially affected by the outcome of this case."

I have stated my opinion in the dissent filed in this case on its original deliverance. Moreover, my views have also been expressed in other similar cases heard before this Court. I find them altogether consistent. In addition, I have carefully reviewed my file in this matter throughout the time of its consideration before the Court, both upon its original submission on briefs and after that submission was withdrawn and the case was again submitted after oral argument. The filing of actions by a fellow justice against

other insurers in no way influenced or affected my consideration of this appeal.

As to the class action aspect of the allegations of appellant's motion, I too, will not allow myself to be included in the alleged class. The circuit court where the action is pending will be so advised.

It is obvious that the Court had great difficulty in the resolution of this appeal. The case was hotly contested in the trial court by able counsel, strongly argued here, and affirmed by a divided Court. It is indeed unfortunate that the litigation has resulted in a serious charge impugning the honesty and integrity of the Court and its members.

MADDOX, JUSTICE (Concurring specially as to the ruling on the motion for disqualification).

Aetna's Motion for "Disqualification and Motion for Withdrawal of Opinion of December 7, 1984. and for Hearing De Novo," in pertinent part reads as follows:

> "COMES now the Appellant, AETNA LIFE INSURANCE COMPANY, and moves Justice T. Eric Embry to disqualify himself from considering the Appellant's pending application for rehearing, that the remaining Justices of this Court disqualify themselves as Justices considering the appellant's pending application for rehearing, for this Honorable Court to withdraw its opinion of December 7, 1984, which affirmed the verdict of the trial court, for the Clerk of the Supreme Court to certify the disqualifications of the Justices to the Governor of the State of Alabama in accordance with § 12-2-14, *Code of Alabama, 1975,* and for the special court to hear this case *de novo.* As grounds for said motion, appellant states as follows:
>
> > "1. That on January 19, 1984, after this case was submitted to this Honorable Court for consideration, Justice T. Eric Embry filed an action

in the District Court of Jefferson County, Alabama, which is styled as follows, *T. Eric Embry v. Maryland Casualty Company,* Civil Action No. DV-84-00963, which was dismissed on April 6, 1984. . . .

"2. That on January 30, 1984, after this case was submitted to this Honorable Court for consideration, Justice T. Eric Embry filed an action in the Circuit Court of Jefferson County, Alabama, which is styled as follows, *T. Eric Embry, etc.* v. *Blue Cross/Blue Shield of Alabama,* Civil Action No. CV-84-500-447, and which is still pending in the Jefferson County Circuit Court. . . .

"3. In the Circuit Court of Jefferson County lawsuit against Blue Cross/Blue Shield, Justice T. Eric Embry alleges on behalf of himself and on behalf of a class of all state employees, among other things, that the failure of the defendant insurance company to pay a portion of his medical and hospital claim and delays in the payment of his claim by the defendant insurance company were committed in bad faith. In the District Court of Jefferson County lawsuit, Justice T. Eric Embry, individually, alleged that the defendant insurer in bad faith refused to pay his claim. Both cases demanded the imposition of punitive damages against the respective defendant insurers.

"4. On February 14, 1985 and/or February 15, 1985, the appellant, through its attorneys, was made aware that Justice T. Eric Embry was a party plaintiff in the suits alleging bad faith. . . .

"5. Under the *Alabama Canons of Judicial Ethics,* Canon 3.C(1)(d)(ii), a Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned if the

Judge has an interest that could be substantially affected by the outcome of the proceeding. Further, the law of Alabama, as set forth in the attached brief, clearly mandates that Justice T. Eric Embry was disqualified from considering and participating in this case and that each Justice of this Court is also disqualified.

"6. Each Justice of this Court participated in the Opinion of December 7, 1984, and *may have an interest as a possible class member plaintiff in the Circuit Court action filed by Justice T. Eric Embry and as such has an interest that could be substantially affected by the outcome of this case.*

"• • • • •

"10. Due to the disqualification of Justice T. Eric Embry and all the Justices of this Court, the Court must withdraw its opinion of December 7, 1984, for the Clerk of the Supreme Court to certify these disqualifications to the Governor of the State of Alabama, and for the special court to reconsider *de novo* this case in its entirety, as required by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

"11. The undersigned attorneys are duly and legally admitted to practice law by the Supreme Court of Alabama, are now attorneys in good standing of the Bar of this Court and hereby certify that this motion is filed in good faith and is filed because the undersigned have an obligation to the court as well as to our client. We owe the public a duty to aid the administration of justice, to uphold the dignity of the court and to respect its authority. . . ." (Emphasis added.)

As is apparent from the motion itself, the primary thrust of the motion, particularly paragraph 5, is that Mr. Justice T. Eric Embry is disqualified because of the provisions of

Alabama Canons of Judicial Ethics, Canon 3.C(1)(d)(ii). Every other Justice is alleged to be disqualified because "[e]ach Justice of this Court participated in the opinion of December 7, 1984, and may have an interest as a possible class member plaintiff in the Circuit Court action filed by Justice T. Eric Embry and as such has an interest that could be substantially affected by the outcome of this case." Canon 3.C(1)(d)(ii) provides:

> "C. Disqualification:
>
> "(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
>
> "• • • • •
>
> "(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:
>
> "• • • • •
>
> "(ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding."

As I understand the motion, it is directed to me only insofar as I "may have an interest as a possible class member plaintiff in the Circuit Court action filed by Justice T. Eric Embry."

Insofar as I am personally concerned, the movant has failed to show that I am disqualified, but to prevent any question on the matter, I am going to request the clerk of this Court to certify a copy of this special concurrence to the Tenth Judicial Circuit, and to notify the Circuit Court that I do not desire to be a member of any class which has been, or may be, certified in *T. Eric Embry, etc. v. Blue Cross/Blue Shield of Alabama*, Civil Action No. CV-84-500-447.

Recusal is required only where "facts are shown which make it reasonable for members of the public, or a party, or counsel opposed to question the impartiality of the judge." *Acromag-Viking v. Blalock*, 420 So. 2d 60, 61 (Ala. 1982).

Recusal is not required by a mere allegation of bias unsupported by substantial fact. *Acromag-Viking* v. *Blalock, supra.* Because I have no personal interest in the action filed by Mr. Justice Embry, I am not disqualified. I have no personal bias against the movant or any other party to the litigation, although my views *on the law* relative to "bad faith" actions is set out not only in my dissent in this case, but in others also.

By writing this special concurrence, I should not be understood as expressing an opinion on the question of whether any other member of this Court should or should not be disqualified, because I believe that the question of recusal of an appellate judge can be decided better by the judge himself.[1] My view comports with the American Bar Association Standards Relating to Appellate Courts, Section 3.42, which provides:

> "3.42 Disqualification of Judges. A judge of an appellate court should be subject to disqualification on the grounds set forth in the Code of Judicial Conduct recommended by the American Bar Association, and in any case in which the judgment under review is one by a court in whose decision he participated as a judge in a lower court.
>
> "*Commentary*
>
> "An appellate judge should be subject to challenge

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[1] In *Duncan v. Johnson*, 338 So. 2d 1243 (Ala. 1976), I recused myself because a justice had represented one of the parties to the litigation. See also, *Simpson v. City of Montgomery*, 282 Ala. 368, 211 So. 2d 498 (1968).

for cause on the same grounds as a trial judge, and also when an appeal involves a review of his own decision. The most difficult problem concerns the procedure to be employed. As in the challenge of a trial judge, if the challenge is sufficient on its face and any reasonable doubt of the judge's disinterestedness is suggested, the judge may be expected to disqualify himself. If he does not do so, in the case of a trial judge factual issues relating to disqualification should properly be determined by another judge. See § 2.32, Standards Relating to Trial Courts. In the case of an appellate judge, however, that procedure would subject the judge to decision of his disinterestedness by official peers with whom he may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's 'bias' is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself. If he is a judge of an intermediate appellate court, there remains the remedy of appeal from a decision in which he participates; if he is a judge of a supreme court, reliance must be placed on his recognition that a court should not only be disinterested but that it should appear to be so.

"In some jurisdictions, peremptory challenge of a trial judge is permitted. See Commentary to § 2.32(b), Standards Relating to Trial Courts. This procedure is inappropriate in the case of an appellate judge. In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions

for exercising the broad discretion reposing in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court. Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views."

See, also *State ex rel. Wild v. Otis*, 257 N.W. 2d 361 (Minn. 1977); contra: *State ex rel. Short, Atty. Gen., v. Martin*, 256 P. 681 (Okla. 1927) (Supreme Court has power to disqualify any one or more of its members from participating in a case).

In determining that I am not disqualified, I have applied the following test, set out in *Ex parte Cornwell*, 144 Ala. 497, 498-99, 39 So. 354 (1905):

"It is true that the respondent has no direct, pecuniary interest in the result of the prosecution by the State against the petitioner on the pending indictments. And, if the question of disqualification were left to be determined alone by the terms of the statute, § 2637 of the Code, under the facts in the present case, no disqualification could be said to exist. But, under the common law, there are other grounds than those mentioned in the statute, which go to the disqualification of the judge.

"In *Gill v. State*, 61 Ala. 172, it was said, 'According to the stern morality of the common law, a judge is required to be legally indifferent between the parties.' In *Freeman on Judgments*, § 145, it is said to be 'Well settled by the common law that no judge ought to act where, from interest or any other cause, he is supposed

to be partial to one of the suitors.' Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. The judge is human, and human nature at best is weak, and as far as it is possible a perfect equipoise should always be preserved in the administration of justice by the courts. Pecuniary interest in the result of the suit is not the only disqualifying interest. If such were true, there would exist no disqualification in the judge to try a defendant on a charge of arson in the burning of the house of the judge. And yet no one would for a moment question the existence of such an interest in the result of the trial, the probable and natural tendency of which would be to create a bias, that would affect the competency of the judge."

Based on the foregoing, I am of the opinion that it is better that the question of recusal of an appellate judge be decided by the judge himself, and I have determined that the movant has failed to show that I should disqualify myself in this case; therefore, I am of the opinion that the movant's request is due to be denied.

APPENDIX C

THE STATE OF ALABAMA — — — — JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

March 25, 1985

82-426

Mobile Circuit Court

CV-78-001614

AETNA LIFE & CASUALTY INSURANCE COMPANY

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ORDER

Appellant Aetna Life Insurance Company having filed a motion in this Court, with amendment thereto, wherein it requests this Court to suspend the requirements of Rule 40, Alabama Rules of Appellate Procedure, and to grant it leave to file a second application for rehearing and further for a stay of judgment pending determination of the motion to suspend the rules or to advance the motion to suspend the rules on its docket so that it will be ruled upon prior to March 26, 1985; and, in the event the Court denies the motion to suspend the rules, appellant asks that its motion for stay of execution of judgment be treated as a motion for stay pending the timely filing of a jurisdictional statement in the Supreme Court of the United States; and the same having been submitted and duly considered by the Court, it is considered that the relief requested by the appellant is due to be denied.

IT IS, THEREFORE, ORDERED that the motion to suspend rules and motion for stay of execution of judgment

and the amendment to motion to suspend rules and motion for stay of execution of judgment be, and the same are hereby, denied.

Torbert, C. J., and Maddox, Faulkner, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.
Jones, J., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 25th day of Mar. 1985.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

April 2, 1985

THE STATE OF ALABAMA — — — — JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

82-426 and 82-1152

AETNA LIFE & CASUALTY INSURANCE COMPANY, INC.

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.

MOBILE CIRCUIT COURT #CV-78-001614

This cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Aetna Life & Casualty Insurance Company, Inc., and Aetna Casualty & Surety Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION PER CURIAM

FAULKNER, JONES, ALMON, EMBRY AND ADAMS, JJ., CONCUR; TORBERT, CJ., MADDOX, SHORES AND BEATTY, JJ., DISSENT.

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

AETNA LIFE INSURANCE CO., *Appellant*

-VS-

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR., *Appellees*

On Appeal From The Circuit Court of Mobile County, Alabama

BRIEF OF
DEFENDANT, AETNA LIFE INSURANCE COMPANY
PETITION FOR REHEARING

[Filed Dec. 28, 1984. Clerk, Supreme Court of Alabama]

SINTZ, PIKE, CAMPBELL & DUKE
Peter V. Sintz
William M. Cunningham

Attorneys for Aetna Life Insurance Company

DRINKARD & SHERLING
Mary Beth Mantiply

Attorney for Aetna Life Insurance Company

ORAL ARGUMENT REQUESTED

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ISSUE X

The Errors Committed Have Resulted In A Violation Of Aetna's Rights Under The Constitution Of The United States

If this decision is allowed to stand, one consequence of the errors committed is that Aetna's rights under the Constitution of the United States will be infringed. Not only will Aetna be deprived of its property without due process, but Aetna will be subjected to a confiscatory and excessive fine. In addition, Aetna will have been denied equal protection of the law.

A. *The Decision Of This Court, By In Essence Retroactively Reversing Numerous Well Settled Precedents And As A Result Of Those Reversals, Imposing A $3.5 Million Penalty Constitutes An Excessive Fine And An Unlawful Taking of Property In Violation Of Aetna's Right To Due Process.*

As is established elsewhere in this brief, the law in Alabama was clear in three areas prior to the decision in

this case. First, to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered had to show that the plaintiff was entitled to a directed verdict on the underlying contract claim. *National Savings Life Insurance Co. vs. Dutton,* 419 So.2d 1257 (Ala. 1982); *National Security Fire & Casualty Co. vs. Bowen,* 417 So. 2d 179 (Ala. 1982). Second, partial payment of a claim, based upon some reasonable rationale, indicated a lack of bad faith. *Sexton vs. Liberty National Life Insurance Co. vs. Bowen,* 417 So.2d 179, 186 (Ala. 1982). Third, it was uniformly held to be improper to allow evidence of the plaintiff's financial condition to be introduced at trial. *Southern Life & Co. vs. Whitman,* 358 So.2d 1025 (Ala. 1978). In each instance, these long standing rules of law were reversed by the decision of this Court in *Aetna Life Insurance Co. Inc. vs. Lavoie.* Aetna submits that to impose ex post facto, a $3.5 million penalty based upon newly enunciated legal principles which effectively reverse substantial bodies of prior law, constitutes an unlawful taking of property without due process, and is prohibited under the Fifth and Fourteenth Amendments to the Constitution of the United States. In addition, Aetna urges that such a result is the imposition of an excessive fine proscribed by the Eighth Amendment to the Constitution of the United States.

Finally, the manner in which the punitive damage award was determined constitutes a denial of due process of law and the amount of the punitive damage award, in proportion to the alleged actual damage is arbitrary, capricious, irrational and confiscatory in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

B. *The Imposition Of A Ten Percent Penalty If A Money Judgment Is Affirmed On Appeal Constitutes A Violation Of Both Due Process And Aetna's Right To Equal Protection Under The Law.*

Code of Alabama § 12-22-72 (1975) provides that if an Appellate Court affirms a money judgment, it must then impose what is in effect a ten percent penalty on the unsuccessful appellant. Of course, this statute operates only against defendants since they are the only litigants with money judgments running against them. Such a penalty undoubtedly has an in terrorem effect on a defendant's ability to exercise his right of appeal. In addition, it certainly imposes an unfair burden on defendants, in terms of equal access to the courts.

Aetna submits that to impose such a penalty violates its right to due process and its right to equal protection, both protected by the Fourteenth Amendment of the Constitution of the United States.

The result in *Aetna Life Insurance Co., Inc. vs. Lavoie* cannot stand when measured against the rights protected by the Constitution. The imposition of a $3.5 million fine based upon retroactive revocation of long standing legal rules, and the imposition of an additional ten percent penalty based solely on this appellant's lack of success on appeal are contrary to any notion of fairness. Aetna submits the decision must be reversed.

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Defendant has requested that oral argument be granted on rehearing. The majority opinion has drastically changed the law in three respects. First, with respect to wealth or poverty of a party when mitigation of damages is not and never was an issue in the case. Second, with respect to the rights of an insurance carrier to question part of a claim

when there exists a question of fact. Third, the majority has ignored the effect of the defendant's substantial partial payment.

The majority opinion admitted that the evidence at trial showed the existence of a question of fact on the contract claim, but held it made no difference in this case. This decision has far reaching impact on the insurance industry and both the plaintiffs' and defense bar in prosecuting and defending bad faith cases and in attempting to advise clients.

In addition, there are numerous factual errors relied upon by the majority. For example, the opinion quoted testimony of Brenda Harris which was never read to, heard by or considered by the jury. The documentary evidence affirmatively showed that the Defendant's Assistant Medical Director Bernard Swann ACTUALLY received and reviewed the treating physician's report of 11/4/77 which the the majority said is not so. The majority omitted and overlooked the investigative efforts that were ongoing by Aetna, such as seeking peer review by the Mobile Infirmary, meeting with the City of Mobile Insurance Committee, attempting to get additional medical records from the Mobile Infirmary and reports of the treating physician, Dr. John Douglas.

Lastly, the errors in the majority opinion have resulted in a violation of the defendant's rights guaranteed under the Constitution of the United States of America.

Wherefore, the Defendant prays that this Court grant oral argument on its Application for Re-Hearing in this cause.

/s/ Peter V. Sintz
Peter V. Sintz

/s/ William M. Cunningham, Jr.
William M. Cunningham, Jr.

Of Counsel:
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, AL 36609

/s/ MARY BETH MANTIPLY
Mary Beth Mantiply

Of Counsel:
DRINKARD & SHERLING
1070 Government Street
Mobile, AL 36604

CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of December, 1984, served a copy of the foregoing Brief In Support of Application for Rehearing by mailing a copy of same by United States mail, postage prepaid and properly addressed as follows:

Hon. Joseph M. Brown, Jr.
Post Office Box 66705
Mobile, AL 36660

Hon. Edgar M. Elliott, III
Hon. Karon O. Bowdre
1700 Financial Center
Birmingham, AL 35203

Hon. Harry Cole
P. O. Box 116
Montgomery, AL 36195

Hon. James T. Upchurch
P. O. Box 270
Montgomery, AL 36195

Hon. Charles Graddick
Attorney General
Montgomery, AL

/s/ PETER V. SINTZ
Peter V. Stinz

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

MOTION FOR DISQUALIFICATION AND MOTION FOR WITHDRAWAL OF OPINION OF DECEMBER 7, 1984 AND FOR HEARING DE NOVO

COMES now the Appellant, AETNA LIFE INSURANCE COMPANY, and moves Justice T. Eric Embry to disqualify himself from considering the Appellant's pending application for rehearing, that the remaining Justices of this Court disqualify themselves as Justices considering the appellant's pending application for rehearing, for this Honorable Court to withdraw its opinion of December 7, 1984, which affirmed the verdict of the trial court, for the Clerk of the Supreme Court to certify the disqualifications of the Justices to the Governor of the State of Alabama in accordance with § 12-2-14, *Code of Alabama, 1975,* and for the special court to hear this case *de novo.* As grounds for said motion, appellant states as follows:

1. That on January 19, 1984, after this case was submitted to this Honorable Court for consideration, Justice T. Eric Embry filed an action in the District Court of Jefferson County, Alabama, which is styled as follows, *T. Eric Embry v. Maryland Casualty Company,* Civil Action No. DV-84-00963, which was dismissed on April 6, 1984. (See a copy of said suit which is attached hereto and marked as Exhibit "A".)

2. That on January 30, 1984, after this case was submitted to this Honorable Court for consideration, Justice

T. Eric Embry filed an action in the Circuit Court of Jefferson County, Alabama, which is styled as follows, *T. Eric Embry, etc. v. Blue Cross/Blue Shield of Alabama,* Civil Action No. CV-84-500-447, and which is still pending in the Jefferson County Circuit Court. (See a copy of said suit which is attached hereto and marked as Exhibit "B".)

3. In the Circuit Court of Jefferson County lawsuit against Blue Cross/Blue Shield, Justice T. Eric Embry alleges on behalf of himself and on behalf of a class of all state employees, among other things, that the failure of the defendant insurance company to pay a portion of his medical and hospital claim and delays in the payment of his claim by the defendant insurance company were committed in bad faith. In the District Court of Jefferson County lawsuit, Justice T. Eric Embry, individually, alleged that the defendant insurer in bad faith refused to pay his claim. Both cases demanded the imposition of punitive damages against the respective defendant insurers.

4. On February 14, 1985 and/or February 15, 1985, the appellant, through its attorneys, was made aware that Justice T. Eric Embry was a party plaintiff in the suits alleging bad faith. (See attached Affidavit Exhibit "C".)

5. Under the *Alabama Canons of Judicial Ethics,* Canon 3.C(1)(d)(ii), a Judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned if the Judge has an interest that could be substantially affected by the outcome of the proceeding. Further, the law of Alabama, as set forth in the attached brief, clearly mandates that Justice T. Eric Embry was disqualified from considering and participating in this case and that each Justice of this Court is also disqualified.

6. Each Justice of this Court participated in the Opinion of December 7, 1984, and may have an interest as a possible class member plaintiff in the Circuit Court action filed by Justice T. Eric Embry and as such has an interest that could be substantially affected by the outcome of this case.

7. The opinion issued by this Court on December 7, 1984, unless withdrawn, will substantially alter the law of the State of Alabama in several regards, including but not limited to, partial payment in bad faith cases, evidence regarding the wealth or poverty of parties, the imposition of punitive damages, the weight to be given the testimony of expert witnesses, and the "ordinary" bad faith case, in such a way as to affect the substantive Alabama law governing the class action filed by Justice T. Eric Embry in the Circuit Court of Jefferson County.

8. The failure of the Justices of this Court to disqualify themselves will cause the appellant to be deprived of property in violation of the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.

9. Appellant, Aetna Life Insurance Company, contends now and, upon hearing of this case *de novo* as required by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution, will contend:

(a). That the imposition of punitive damages on the appellant, Aetna Life Insurance Company, is violative of The Contracts Clause, Article 1, § 10, Clause 2 of the Federal Constitution in that the contract of insurance in this matter was entered into prior to Alabama's recognition of a right to recover punitive damages in an action for bad faith refusal to pay an insurance claim.

(b). That the $3,500,000.00 punitive damages award in this case is unconstitutional under the Excessive Fine Clause of the Eighth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

(c). That the $3,500,000.00 punitive damages awarded in this case is an unconstitutional deprivation of property under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution because, *inter alia*, it was

imposed pursuant to no standards and vests excessive discretion in the jury.

(d). That the imposition of a ten percent (10%) penalty imposed under § 12-22-72, *Code of Alabama, 1975,* is facially and, as applied, unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Federal Constitution.

10. Due to the disqualification of Justice T. Eric Embry and all the Justices of this Court, the Court must withdraw its opinion of December 7, 1984, for the Clerk of the Supreme Court to certify these disqualifications to the Governor of the State of Alabama, and for the special court to reconsider *de novo* this case in its entirety, as required by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

11. The undersigned attorneys are duly and legally admitted to practice law by the Supreme Court of Alabama, are now attorneys in good standing of the Bar of this Court and hereby certify that this motion is filed in good faith and is filed because the undersigned have an obligation to the court as well as to our client. We owe the public a duty to aid the administration of justice, to uphold the dignity of the court and to respect its authority.

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, AL 36609

By: /s/ PETER V. SINTZ
Peter V. Sintz

By: /s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of February 1985, served a copy of the above and foregoing pleading upon counsel for all parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

/s/ William M. Cunningham, Jr.
William M. Cunningham, Jr.

IN THE DISTRICT COURT OF JEFFERSON COUNTY, ALABAMA

Civil Action No. DV8400963

T. ERIC EMBRY, *Plaintiff*

v.

MARYLAND CASUALTY COMPANY, *Defendant*

COMPLAINT

[Filed Jan. 19, 1984. District Court of Jefferson County Civil Division]

A. During 1983, plaintiff and defendant entered into a homeowner's insurance policy contract, Policy No. THO-48494058 covering the household effects and personal property of the plaintiff and his wife, Bedford Embry, at their house at 3609 Springhill Road, Birmingham, Alabama. There was a champagne mink coat valued at $2,000 listed on a schedule of covered property in the said homeowner's insurance policy. Defendant agreed to pay to plaintiff the replacement value of that said mink coat scheduled on that insurance policy should it be lost, damaged, or stolen.

B. On to-wit, November 23, 1983, plaintiff gave notice to defendant that the said mink coat was lost or stolen and demanded payment of the replacement value as shown in the said insurance contract. The defendant gave no response.

C. Sometime immediately prior to Christmas 1983, plaintiff called the defendant to inquire about the status of his claim for the mink coat. Defendant informed plaintiff that it had the claim and was processing it, presumably for payment, and that defendant would notify plaintiff within the next week or so.

D. The defendant has failed to respond whatsoever to plaintiff's claims for payment of the replacement value of

the said fur which is due to be paid under the insurance contract mentioned above.

COUNT ONE

1. Plaintiff hereby adopts herein all of the previous paragraphs set forth above.

2. Plaintiff claims $2,000 damages from defendant for breach of the above mentioned insurance contract between plaintiff and defendant.

WHEREFORE, plaintiff demands judgment against defendant in the amount of Two Thousand Dollars ($2,000.00).

COUNT TWO

1. Plaintiff hereby adopts herein by reference all of the allegations in paragraphs A through D.

2. Plaintiff avers that defendant in bad faith, willfully, intentionally, and/or maliciously failed to pay a valid claim under the aforementioned insurance contract without lawful excuse. Plaintiff claims $3,000 damages for defendant's bad faith failure to pay a valid claim. Plaintiff claims punitive damages.

WHEREFORE, plaintiff demands judgment against defendant in the sum of Three Thousand Dollars ($3,000.00).

SIROTE, PERMUTT, FRIEND, FRIEDMAN, HELD & APOLINSKY, P.A.

By: /s/ C. LEE REEVES
C. Lee Reeves
P. O. Box 55727
Birmingham, Alabama 35255
(205) 933-7111

PLAINTIFF'S ADDRESS:

3609 Springhill Road
Birmingham, Alabama 35233

PLEASE SERVE DEFENDANT AS FOLLOWS:

Maryland Casualty Company
940 Montclair Road
Birmingham, Alabama 35213

[SEAL] I hereby certify that this is a true and correct copy. This the 20th of Feb. 1985,

/s/ POLLY CONRADI, Clerk*

---

* The Case Action Summary—Civil, and Fee Sheet (Civil) attached to this exhibit as filed in the Supreme Court of Alabama will be lodged with the Clerk of the Supreme Court of the United States simultaneously with filing this Jurisdictional Statement.

Exhibit "B"

IN THE CIRCUIT COURT FOR THE
TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA

Civil Action No. 500 447

T. ERIC EMBRY, *Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross/Blue Shield of Alabama, Group Policy Number 1300,*

v.

BLUE CROSS/BLUE SHIELD OF ALABAMA, *Defendant*

COMPLAINT

[Filed in Office, '84 Jan. 30, P4:17. D. L. Cockrell, Register]

Parties

1. Plaintiff, T. Eric Embry, is an adult resident citizen of Jefferson County, Alabama.

2. The defendant, Blue Cross/Blue Shield of Alabama is a corporation organized and existing under and by virtue of the laws of the State of Alabama with its principal place of business in Jefferson County, Alabama.

Factual Allegations

3. On to wit: 1 October, 1982, plaintiff, T. Eric Embry, was enrolled as a member of the Alabama State Employees Health Insurance Plan, a plan under which he and his dependent wife, Bedford Stall Embry (deceased as of 20 September, 1983) were insured against monetary losses resulting from Hospital-Surgical-Medical and Major Medi-

cal expenses subject to all the terms and conditions and limitations of a master contract between the State of Alabama and Blue Cross/Blue Shield of Alabama as Administrator of the plan. That contract is commonly known and referred to as Group Number 13000 by said Administrator. The Plaintiff and his wife were insured under the Plan, having contract number 418122167. From and after 1 October, 1982 to the date of the filing of this complaint plaintiff has remained insured under the said Plan and the premiums have been paid and continue to be paid on behalf of the Plaintiff by the State of Alabama as a part of the benefits of his employment by the State. Premiums for dependent coverage under said plan for Plaintiff's late wife were paid monthly, from 1 October, 1982 through 20 September, 1983 by the Plaintiff.

Pursuant to Rule 23 of the Alabama Rules of Civil Procedure, this action is brought on behalf of the Plaintiff, T. Eric Embry, and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross/Blue Shield of Alabama, Group Policy Number 13000.

Class Action Allegations

4. The Plaintiff avers, on information and belief, as follows:

a) That the members of the class as defined in the preceding paragraph are so numerous that joinder of all members is impractical.

b) That there are hundreds of persons who are members of the class as defined hereinabove.

c) That there are questions of law and fact common to the said class.

d) That the said questions of law and fact common to the members of the said class include, but are not limited to, the following:

i) Whether the defendant, Blue Cross/Blue Shield of Alabama has in effect a master contract of medical and hospitalization insurance with the State of Alabama whereby employees of the State of Alabama and their enrolled dependents are insured against monetary losses resulting from certain medical and hospital expenses.

ii) Whether or not the defendant, Blue Cross/Blue Shield of Alabama, has a policy or custom of unreasonably delaying payment of valid claims made by insureds under the said group policy.

iii) Whether the defendant, Blue Cross/Blue Shield of Alabama, has a policy or practice of paying to medical providers only such amount or amounts as Blue Cross/Blue Shield unilaterally deems to be "reasonable" for the particular service, charge or procedure, regardless of what the provider may actually charge.

iv) Whether the defendant, Blue Cross/Blue Shield of Alabama, charges insurance premiums to the Alabama State Employees Health Insurance plan based on the actual charges of medical providers for their services, medical procedures, and medical treatment.

v) Whether the defendant, Blue Cross/Blue Shield of Alabama, charges premiums to the Alabama State Employees Health Insurance Plan, for Group Policy Number 13000, the cost of which is based on the actual charges of medical providers for their services, treatment and procedures, while simultaneously refusing to pay to those medical providers the amount of any actual charge which exceeds that which the defendant, in its unilateral opinion, deems "reasonable".

e) The claims of Plaintiff are typical of the claims of the said class.

f) Plaintiff will fairly and adequately represent the interests of said class.

g) Prosecution of separate actions by individual members of said class would create a risk of:

i) Inconsistent or varying adjudications with respect to individual members of the class sued for which would establish incompatible standards of conduct for the defendant; and

ii) Adjudications with respect to individual members of the class sued for, which would as a practical matter, because of the applicable statutes of limitation, and because of the expense of trial, depositions and other discovery procedures, be dispositive of the interests of other member of the class sued for, not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

h) The acts of the defendant alleged in this complaint are wrongs against each and every member of said class sued for herein, on the grounds generally applicable to the said class and each member thereof, making appropriate declaratory relief with respect to the class sued for as a whole.

i) The actions of the defendant as set forth hereinabove were all pursuant to a common course of conduct, custom or policy of the defendant which operated as a breach of contract and a breach of duty to the plaintiff and others similarly situated.

j) The questions of law and fact common to the members of the class sued for here predominate over any questions affecting only individual members.

k) Permitting a class action herein is and will be superior to other available methods for the adjudication of controversies and claims set out herein between members of the class sued for and the defendants herein.

Factual Allegations

Plaintiff avers that he is an employee of the State of Alabama. On to wit: October 1, 1982, the plaintiff, T. Eric Embry, was enrolled as a member of the Alabama State Employees Health Insurance Plan, a plan under which he and his dependent wife, Bedford Stall Embry (deceased as of September 20, 1983) were insured against monetary losses resulting from Hospital-Surgical-Medical and Major Medical expenses subject to all the terms and conditions and limitations of a master contract between the State of Alabama and Blue Cross/Blue Shield of Alabama as Administrator of the plan. That master contract is known as Group Policy Number 13000. Plaintiff and his wife were insured pursuant to the said plan, having contract Number 418122167. From and after October 1, 1982 to the date of the filing of this complaint, Plaintiff has remained insured under the said Plan and the premiums paid and continue to be paid on behalf of the Plaintiff by the State of Alabama as a part of the benefits of his employment by the State. Premiums for the dependent coverage under said Plan for Plaintiff's late wife were paid monthly, from October 1, 1982 through the date of her death, September 20, 1983, by the Plaintiff.

5. Plaintiff claims that during and throughout the period October 1, 1982 to the date of filing of this complaint, the plaintiff and his wife, now deceased, underwent numerous medical procedures, incurred various expenses for medical treatments, medications, and other medical and surgical treatment. During and throughout the period October 1, 1982 to the date of the filing of this complaint, Plaintiff has filed with defendant, pursuant to the terms of said

policy, numerous claims for payment relating to medical treatment, doctors and hospital charges, and other covered expenses on behalf on of both himself and his spouse, now deceased.

6. Plaintiff avers that during the period October 1, 1982 through the time of filing of this complaint, the defendant has willfully and intentionally and fraudulently, as a part of the deliberate plan or scheme, (a) failed to pay many claims of the plaintiff from funds available to it, or in the custody or control from the Alabama State Employees Health Insurance Plan Fund, and further,

(b) in many instances, if the defendant did pay a claim at all, it did not pay the claim in full and failed and refused to pay the said claim in full and further,

(c) in many instances, if the defendant did pay the claim at all, in whole or in part, it paid the claim in a very late and untimely manner and only after unreasonable delay.

(d) Plaintiff further avers that the defendant, Blue Cross/Blue Shield of Alabama, as a conscious, willful and intentional and fraudulent plan or scheme, as withheld payment of valid claims for unreasonable lengths of time and in so doing, unlawfully enriched itself by investment of the money wrongfully withheld by it. Plaintiff avers that the said actions of defendand as set forth hereinabove of unreasonably delaying payment of valid claims and failure to pay valid claims in full within a reasonable time has injured the Plaintiff and others similarly situated, has caused the plaintiff and others similarly situated to suffer embarrassment and humiliation by being unable to promptly pay doctors, hospitals, pharmacies, and other medical services.

7. Plaintiff further avers that the defendant, Blue Cross/Blue Shield of Alabama, has a master contract with the Alabama State Employees Health Insurance Plan, to wit,

Group Number 13000. Plaintiff avers that the defendant, Blue Cross/Blue Shield of Alabama, has charged premiums to the State of Alabama, through the Alabama State Employees Health Insurance Plan, based upon the actual charges made by health care providers for the various services, treatment and supplies charged by those providers. Plaintiff further avers that even though the defendant, Blue Cross/Blue Shield of Alabama, bases its premium charge to the Alabama State Employees Health Insurance Plan on the actual charges of medical providers for their various services, that Blue Cross/Blue Shield of Alabama has a policy or custom of paying to medical providers only those charges for various medical services which the defendant, in its unilateral discretion, has deemed to be "reasonable", regardless of the actual charges of the provider. Plaintiff avers that the aforesaid conduct of the defendant has proximately resulted in the Alabama State Employees Health Insurance Plan paying excessive charges to the defendant and causing the said Plan to pay excessively high premiums on behalf of the employees of the State of Alabama and causing these employees, including the plaintiff, who carry dependent coverage pursuant to the said policy, to pay excessively high premiums for the medical insurance coverage.

8. Plaintiff avers that the defendant has acted in bad faith in its breach of the master contract, Group Number 13000, with the Alabama State Employees Health Insurance Plan.

Causes of Action

Count I

9. Plaintiff hereby adopts and incorporates by reference each and every allegation of the preceding paragraph as if fully set out herein.

10. Plaintiff avers that the defendant has breached an agreement with Plaintiff and other members of the class by:

a) Failing to pay valid claims of plaintiff and those of other members of the said class pursuant to the terms of the master contract between defendant and the State of Alabama;

b) Failing to pay valid claims of the plaintiff and those of other members of the class in full;

c) Failing to pay the claims of the plaintiff and those of other members of the class within a reasonable time and in delaying payment of valid claims for an unreasonable length of time.

(d) Charging premiums to the State of Alabama based on the actual charges of medical providers while maintaining a policy of paying only a portion of those actual charges to health care providers.

3. Plaintiff avers that as a direct and proximate result of the allegations as set forth hereinabove, plaintiff, and others have been injured and damaged and that the Alabama State Employees Health Insurance Fund has been injured and damaged.

Count II

11. Plaintiff hereby adopts and incorporates by reference each and every allegation of the preceding paragraphs as if fully set out herein.

12. Plaintiff avers that there is no lawful basis for the actions of defendant, to wit, in

(a) Refusing to pay valid claims of the plaintiff, and those of other members of the class;

(b) Refusing to pay in full valid claims of the plaintiff and those of other members of the class;

(c) Refusing to pay valid claims of the plaintiff and other members of the class in a timely manner.

(d) Having a policy or custom of failing and refusing to pay valid claims submitted to it under Group Policy 13000, refusing and failing to pay claims submitted under Group Policy 13000 in full, and in refusing to pay valid claims under Group Policy 13000 in a timely manner and in making any payments that are Tmade in whole or in part, only after unreasonable delay. The plaintiff further avers that the defendant, its agents and employees, knew and have known that there is no lawful basis for refusing or failing to pay the valid claims of plaintiff and other members of the class within a reasonable time pursuant to the said group policy; that the defendant, its agents and employees, knew that there was no lawful basis for refusing or failing to pay the claims of plaintiff and those other members of the class herein in full; and further, that the defendant, its agents and employees knew and have known that there is no lawful basis for refusing or failing to pay plaintiff's claims and those submitted by other members of the class herein.

(e) Having a policy or custom of charging premiums to the State of Alabama for Group Policy 13000 based on the actual charges of health care provided while intentionally paying claims, when or if they are paid at all, only in an amount deemed "reasonable" by defendant and paying in claims only a portion of the said actual charges.

13. Plaintiff avers that the defendant has committed the tort of bad faith in its dealings with the plaintiffs and with other members of the class as defined hereinabove. Plaintiff further avers that the defendant has acted in bad in failing and refusing to pay to plaintiff and other members of the class the benefits to which they are entitled pursuant to the insurance policy or contract, by refusing to pay valid claims in a timely manner, by refusing pay

valid claims in full, and in exercising a policy or course of conduct whereby it refuses to pay valid claims, in whole or in part, submitted by members of the class herein and when it does pay any claims, in whole or in part, pays them in such an unreasonably delayed fashion as to cause plaintiff herein and other members of the class great humiliation and embarrassment; and that as a direct and proximate result of the actions of defendant as set out hereinabove, plaintiff and other members of the class as defined hereinabove have been damaged and injured.

Relief Requested

Plaintiff prays that this Court will, as soon as practical, enter an order certifying this class as a class action pursuant to Rule 23, Alabama Rules of Civil Procedure.

a) Award to Plaintiff, and other members of the class herein, compensatory damage for breach of contract, inconvenience, emotional and mental distress, disappointment, pain and suffering.

b) That this court will award to plaintiff and other members of the class punitive damages for defendant's bad faith breach of contract;

c) That this court will award to plaintiff costs of this proceeding, a reasonable attorney's fee and such other and further relief as the court deems just and proper.

/s/ W. Eugene Rutledge
W. Eugene Rutledge
Attorney for Plaintiff

Of Counsel:

Rutledge and Associates
1300 Brown Marx Tower
2000 First Avenue North
Birmingham, Alabama 35203
Telephone: (205) 322-8761

Jury Demand

Plaintiff demands a trial by jury on all issues triable to a jury.

/s/ W. Eugene Rutledge
W. Eugene Rutledge

Plaintiff's Address

3609 Spring Hill Road
Birmingham, AL 35223

Serve Defendant At:

Blue Cross/Blue Shield of Alabama
c/o William Mandy, President
450 Riverchase Parkway, East
Birmingham, Alabama 35298

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN EQUITY

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, the undersigned, as Register of the Circuit Court, Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing contains a full, true and correct copy of the instrument herewith set out as appears of record in said Court.

Witness my hand and seal of said Court, this the 15th day of February, 1985.

/s/ [Illegible], Register.
By: /s/ SUE WHITE, Deputy Register.

Exhibit "C"

STATE OF ALABAMA)
COUNTY OF MOBILE)

AFFIDAVIT

Personally appeared before me, the undersigned authority, this day came Peter V. Sintz and who after being first duly sworn does depose and say as follows:

My name is Peter V. Sintz and I am over the age of twenty-one years. I have been a licensed practicing attorney in Mobile, Alabama since September, 1967. I am one of the attorneys of record for Aetna Life Insurance Company in the case of Margaret Lavoie v. Aetna Life Insurance Company. On Thursday, February 14, 1985, I received a phone call from Mary Beth Mantiply, a practicing attorney in Mobile, Alabama, and formerly associated in the practice of law with our firm, informing me that Justice T. Eric Embry had pending and has pending a lawsuit alleging bad faith against Blue Cross/Blue Shield. I was informed that the suit was pending in the Circuit Court of Jefferson County. I called the Circuit Court clerk's office and learned that the lawsuit by Justice T. Eric Embry against Blue Cross/Blue Shield was filed on January 30, 1984. This was after the notice of appeal and briefs had been filed in Lavoie v. Aetna but before oral argument before the Supreme Court of Alabama. I learned that the defense attorney for Blue Cross/Blue Shield is William G. Sommerville, Jr., and I called and talked with him on February 14, 1985, and learned that the T. Eric Embry as Plaintiff is in fact Justice T. Eric Embry who participated in the oral argument and majority decision in Lavoie v. Aetna Life Insurance Company. My office then called the Aetna Life Insurance Company claim office in Birmingham, Alabama and asked them to obtain copies of the complaint filed by Justice Embry. It is attached to the

motion to recuse and set aside the opinion filed with this affidavit. We also learned that Justice Embry had filed a second lawsuit alleging bad faith on Friday, February 15, 1985, but that this lawsuit styled T. Eric Embry v. Maryland Casualty was filed on January 19, 1984, and had been dismissed on April 6, 1984. Until my telephone conversation of February 14, 1985, with Mary Beth Mantiply neither I, nor anyone representing Aetna Life Insurance Company had any knowledge of the pending active litigation alleging bad faith against an insurance carrier by Justice Embry until February 14, 1985. These lawsuits were never mentioned nor disclosed to us by Justice Embry or anyone else during the pendency of the appeal of Lavoie v. Aetna Life Insurance Company. In my opinion some of the legal issues in Justice Embry's pending lawsuit against Blue Cross/Blue Shield are the same or very similar to the legal issues raised in Lavoie v. Aetna Life Insurance Company.

/s/ PETER V. SINTZ
Peter V. Sintz

STATE OF ALABAMA)
COUNTY OF MOBILE)

Personally appeared before me, the undersigned authority, in and for said county and state, PETER V. SINTZ, who being by me first duly sworn does depose and say that he has read the foregoing affidavit and to the best of his knowledge the facts contained therein are true and correct.

/s/ PETER V. SINTZ
Peter V. Sintz

Subscribed and sworn to before me
this 21st, day of February, 1985.

/s/ MARY ANN HEYER
Notary Public

My Commission Expires 3-15-86

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

BRIEF IN SUPPORT OF MOTION FOR DISQUALIFICATION AND MOTION FOR WITHDRAWAL OF OPINION OF DECEMBER 7, 1984 AND FOR HEARING DE NOVO

PETER V. SINTZ
WILLIAM M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, AL 36609

Attorneys for Appellant

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

This matter was tried in the Mobile County Circuit Court beginning on November 1, 1982. At the close of all the evidence, the case was submitted to the jury on two counts alleging breach of contract and bad faith. The jury returned a verdict in favor of the plaintiffs in the amount of $3,501,650.22.

After the post trial motions were denied by operation of law, defendant filed its notice of appeal on February 10, 1983. Briefs were submitted on behalf of both parties with the final reply brief being filed by the appellant on the 27th day of October, 1983. The Supreme Court denied oral argument on the 17th day of November, 1983 and the case was submitted to the Court. The court set aside the denial for oral argument on April 4, 1984 and oral argument was held on May 14, 1984. The court's opinion was issued on December 7, 1984 and the appellant timely filed an application for rehearing on December 28, 1984.

On February 14, 1985, the defendant, Aetna Life Insurance Company, discovered that Justice T. Eric Embry, as plaintiff, had pending at the time of oral arguments and the drafting of the opinion, a lawsuit in the Circuit Court of Jefferson County against Blue Cross/Blue Shield of Alabama, which alleges bad faith failure to pay insurance claims which was filed on January 30, 1984. This suit also purports to be a class action on behalf of all state employees insured under group plan number 1300, issued by Blue Cross/Blue Shield, as well as Justice Embry's personal claim for damages for bad faith refusal to pay. (See attached Exhibit A.)

On February 15, 1985, the attorneys for the appellant, Aetna Life Insurance Company discovered a second lawsuit which had been filed by Justice T. Eric Embry, as plaintiff, in the District Court of Jefferson County, against

Maryland Casualty Insurance Co., which alleged bad faith and which was dismissed in April, 1982. (See attached Exhibit B.)

ISSUES

I.

WHETHER JUSTICE T. ERIC EMBRY IS DISQUALIFIED FROM SITTING IN JUDGMENT IN A CASE INVOLVING THE SAME OR SUBSTANTIALLY THE SAME ISSUES AS HIS PERSONAL BAD FAITH CASE?

§ 12-1-12, *Alabama Code, 1975,*

Bryce v. Burke, Probate Judge, 172 Ala. 219, 55 So. 635.

Ex parte, Cornwell, 144 Ala. 497, 30 So. 354 (1905).

Gill v. State, 61 Ala. 172.

Medlin v. Taylor, 101 Ala. 239, 13 So. 310 (1893).

Morgan County Commission v. Powell, 292, Ala. 300, 293 So.2d 830 (1974)

Pegues v. Baker, 110 Ala. 251

Rushing v. City of Georgianna, 361 So.2d 11 (1978).

Smith v. Pitts, 139 Ala. 152, 36 So. 20

The Alabama Canons of Judicial Ethics, Canon 3C(1)(c), *The Alabama Canons of Judicial Ethics,* Canon 3C(1)(d)(ii)

II.

WHETHER ALL JUSTICES OF THE SUPREME COURT ARE DISQUALIFIED FROM SITTING AS JUSTICES IN THIS CASE WHEN THEY MAY BE MEMBERS OF THE CLASS ALLEGED BY JUSTICE T. ERIC EMBRY IN THE CIRCUIT COURT OF JEFFERSON COUNTY LAWSUIT?

In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 90 L.Ed 942

In re *White,* 53 Ala. App. 377, 300 So.2d 420 (1974).

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III.

WHETHER THE DISQUALIFICATIONS OF A JUSTICE OR JUSTICES SHOULD RESULT IN A WITHDRAWAL OF THE OPINION OF DECEMBER 7, 1984 AND A RESUBMITTAL OF THE CASE *DE NOVO?*

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In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 90 L.Ed 942
Gibson v. Berryhill, 411 U.S. 564, 579 (1973

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Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444 71 L.Ed. 749.

Withrow v. Larkin, 421 U.S. 35 46-47 (1975)

ARGUMENT

I.

Whether Justice T. Eric Embry Is Disqualified From Sitting In Judgment In A Case Involving The Same Or Substantially The Same Issues As His Personal Bad Faith Case?

Alabama has been a leader in the nation in the area of legal ethics. In 1887, Alabama drafted the first Code of Legal Ethics in the country which was adopted with minor changes by other states and by the American Bar Association. Recognizing its leadership role, the Supreme Court of Alabama formulated and established principles which govern the conduct of members of the judiciary in the *Canons of Judicial Ethics.* The *Code of Alabama* also speaks directly to judicial ethics in § 12-1-12, *Alabama Code, 1975,* regarding disqualification of Judges and states as follows:

> "No judge of any court shall sit in any case or proceeding in which he is interested or related to any party within the fourth degree of consanguinity or affinity or in which he has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties entered of record or put in writing if the court is not of record."

The disqualifications set forth in the statute are non-exclusive. One must look to the qualifications which the common law imposes and which still remain in full force and effect. Under the stern morality of the common law, a judge is required to be legally indifferent between the parties. *Gill v. State,* 61 Ala. 172.

The Alabama Supreme Court has addressed itself to the common law principles involving instances where a judge's

interest in a lawsuit is not pecuniary and is not covered by § 12-1-12.

> "A judge or justice may be without pecuniary interest which will be affected by the result of a suit pending before him, and yet he may be a party to, or have an interest in, a suit involving the same questions upon which he is required to pass judgment. The bias, in favor of the one party or the other, naturally resulting, is deemed by the common law a disqualification." *Pegues v. Baker,* 110 Ala. 251

Under this line of reasoning, the statutory causes of disqualification of the judge are not exclusive of the common law principle. This is the controlling precedent in Alabama law. *Rushing v. City of Georgianna,* 361 So.2d 11 (1978).

The Alabama Supreme Court in 1893 addressed the issue of whether a probate judge properly disqualified himself in an election contest where the judge's own election was being contested in another action in a circuit court on the same grounds specified in the statement of contest in question. *Medlin v. Taylor,* 101 Ala. 239, 13 So. 310 (1893). The court found that the judge not only had no pecuniary interest, but also that he had *no* interest whatsoever which might be affected by any possible determination of the issues involved in the matter before him. However, the court agreed with the probate judge's decision to disqualify himself under the doctrine of the common law since he had a personal interest in the questions involved in the contestation before him. The same principle of personal interest affects Justice Embry's ability to sit in this case.

If a judge has any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against the party to the suit, that tendency is sufficient to disqualify him as a judge. *Exparte, Cornwell,* 144 Ala. 497, 30 So. 354 (1905).

In *Morgan County Commission v. Powell,* 292, Ala. 300, 293 So.2d 830 (1974), this court determined that one of the common law grounds disqualifing a judge is that a judge ought not act where, from interest or any other cause, he is supposed to be partial to one of the suitors. *Smith v. Pitts,* 139 Ala. 152, 36 So. 20 (1904); *Bryce v. Burke, Probate Judge,* 172 Ala. 219, 55 So. 635, (1911). Furthermore, the court in *Morgan County, supra,* stated that a judge should not act if he has any interest, the probable and natural tendency of which is to create a bias in the mind of a judge for or against a party to the suit. *Morgan County, supra,* at page 311. Justice Jones in his special concurring opinion sums up the necessity that the justice system be totally impartial to all parties appearing before it when he said:

> "Paramount to any system of justice is the total impartiality of the court which sits in judgment of any controversy. The appearance of fairness is virtually as important as is fairness itself. One of the essential ingredients of an effective judiciary is the high level of respect accorded it by the citizenry. Except for the impartiality of those who occupy the role of judge, both in act and appearance, the level of respect necessary to a strong and effective judiciary will fail. It is the essence of the system that any position of interest or bias is sufficient cause for disqualification of a judge, and the right to raise and insist upon the causes of disqualification must be zealously guarded. . ." Supra at 312.

Are the requisite high standards of conduct and respect of the judiciary fulfilled when a justice has the appearance of bias by filing two bad faith cases, one of which alleges that the defendant insurance company ". . . did not pay the claim in full. . ." and who then participates in this case which decided that despite Aetna's partial payment, the bad faith claim was properly submitted to the jury?

The Alabama Canons of Judicial Ethics, Canon 3C(1)(c), states:

"C. Disqualification:

(1) A judge should disqualify himself in a proceeding in which is disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(c) He knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding; . . ."

Also, the Canons of Judicial Ethics in Canon 3C(1)(d)(ii) disqualifies a judge if he is known to have an interest that could be substantially affected by the outcome of the proceeding.

The high standards of judicial ethics in Alabama as reflected in § 12-1-12, *Code of Alabama,* (1975), the developed precedents adopting the principles of common law and the *Alabama Canons of Judicial Ethics* can lead to but one conclusion: that Justice Embry's participation in the decision making process of this Court, including his being a member of the majority opinion of December 7, 1984, mandates his disqualification in this case.

II.

Whether All Justices Of The Supreme Court Are Disqualified From Sitting As Justices In This Case When They May Be Members Of The Class Alleged By Justice T. Eric Embry In The Circuit Court Of Jefferson County Lawsuit?

While the other members of the Court are not known by the appellant to have an interest in the class action suit

filed by Justice Embry, if they are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross/Blue Shield of Alabama, Group Policy Number 1300, there exists the appearance of bias, sufficient to cause their disqualification. *Morgan County, supra* (Justice Jones' special concurrence, page 311).

Another ground of disqualification of the remaining Justices is their participation in general conferences, possible reviews of opinions written by Justices before the published opinion of December 7, 1984, and possible fixed opinion as a result of their deliberations expressed either in the majority opinion or in the dissents.

The Alabama Court of Criminal Appeals addressed the issue of appearance of bias involving a circuit court judge who had expressed opinions on the bail he required of a criminal defendant by sending letters to the Justices of that court. *In re White,* 53 Ala. App. 377, 300 So.2d 420 (1974). In the *White* case, the court reaffirmed language in *State v. Aldridge,* 212 Ala. 660, 103 So. 835 (1925) emphasizing the importance of every individual charged with a crime being accorded a fair and impartial trial:

> " 'It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.' This is but the expression of a well known rule of universal justice everywhere recognized * * *. It is one of the great principles of the common law, for which the people of England had struggled for ages, and which they ultimately succeeded in establishing against the strenuous efforts of a tyrannical government. We can have no higher authority than this for denouncing as illegal everything which interferes with the entire impartirality of every legal tribunal."

The *White* case, supra, also reviewed the U.S. Supreme Court's requirements of due process in the case of *In re*

Murchison, 349 U.S. 133, 75 S. Ct. 623, 90 L.Ed. 942, which concluded that a fair trial in a fair tribunal is a basic due process requirement.

In order to preserve the high standards of judicial ethics, the justices of this Court must disqualify themselves and allow this case to be referred to an impartial panel of judges who are not clothed with any appearance of bias and who would be wholly free, disinterested and independent.

III.

Whether The Disqualifications Of A Justice Or Justices Should Result In A Withdrawal Of The Opinion Of December 7, 1984 And A Resubmittal Of The Case *De Novo*?

This issue appears to be an issue of first impression in Alabama concerning an appellate written, published opinion. The court in Alabama has uniformly held that a judgment is not void on account of disqualification, but is voidable on direct attack on appeal or by a seasonable motion to set it aside. *Hine v. Hussey,* 45 Ala. 496; *Hayes v. Collier,* 47 Ala. 726; *Clouman v. Henderson,* 59 Ala. 559; *Trawick's Heirs v. Trawick's Adm'rs.,* 67 Ala. 271; *Coger v. Franklin,* 79 Ala. 505; *Jeffersonian Pub. Co. v. Hilliard,* 105 Ala. 576, 581, 17 So. 112; *Hutto v. Walker County,* 185 Ala. 505, 511, 64 So. 313, *Ann. CAS,* 1916 B, 372; *Gulf States Steel Co., v. Christison,* 228 Ala. 62, 154 So. 565; *State v. Phillips,* 33 So.2d 239.

While Alabama has not addressed the voidability of an appellate decision, case law dictates that if a disqualified judge issues any orders in a case, the entire case is improperly tainted and new proceedings should be given the parties.

The Court in *Salm v. State,* 89 Ala., 568 So. 66 (1890), found that a judge who was disqualified was incompetent to preside and to properly decline to preside should not

have made certain preliminary orders. In that case, the court reversed the conviction based upon the judge's improper issuance of preliminary orders due to his disqualification as well as on other bases. Since the disqualification in *Salms, supra* extended to preliminary matters, the disqualifications of the justices in this suit should extend to the entire Supreme Court's considerations and deliberations of this case, thus voiding the Opinion of December 7, 1984.

Our sister state of Georgia has addressed this issue and determined that a judge in ordering that a petition in disbarment proceedings be filed and in issuing a Rule NiSi directed to an attorney was performing a judicial act and inasmuch as the judge declared that he was disqualified, even though his disqualification was not announced and acted upon until after the Rule NiSi and order for service were signed, the announcement related back to the petition and the Rule NiSi and rendered them null and void. *Garland v. State,* 140 S.E. 2d 1 146 Ga. App. 756 (1969). More recently, the Georgia Court of Appeals also found that the fact of disqualification of a judge relating back to and rendering all orders or judicial acts taken by him void and null except as to administrative acts. *King v. Ellis,* 14 Ga. App. 157, 246 S.E. 2d 1, (1978).

This result is the only logical approach to the effect of the December 7, 1984 Opinion of this Court. That is, Justice Embry or any other member of the Court is disqualified, the Opinion should be withdrawn and the parties allowed to proceed before an impartial Court.

Should the court determine that it is disqualified to sit in judgment on the application for rehearing, a certificate should be issued by the Clerk of the Court to the Governor of the State of Alabama to appoint a special court to hear this case. § 12-2-14, *Code of Alabama, 1975.* This hearing by the special court should be a *de novo* hearing.

IV.

Whether The Failure Of The Justices Of This Court To Disqualify Themselves Will Cause The Appellant To Be Deprived Of Property In Violation Of The Due Process Clause Of The Fourteenth Amendment Of The Federal Constitution.

That appellant's rights under the Due Process Clause of the Fourteenth Amendment will be violated if its case is not heard and determined *de novo* by unbiased decision makers is well established. In *In re: Murchison,* 349 U.S. 133, 136 (1955), Justice Hugo Black, writing for the Supreme Court, stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end, no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey v. State of Ohio,* 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States,* 348 U.S. 11, 14."

This constitutional principle, recently reaffirmed by a unanimous Supreme Court in *Withrow v. Larkin,* 421 U.S. 35, 46-47 (1975), has even been applied by the Supreme

Court to adjudications before administrative agencies. See *Gibson v. Berryhill,* 411 U.S. 564, 579 (1973). There can be no doubt that this principle applied *a fortiori* to the proceedings of this Honorable Court and that this principle requires that Appellant's case be heard and determined *de novo.*

CONCLUSION OF RELIEF SOUGHT

The appellant, Aetna Life Insurance Company is requesting as stated in its motion that Justice T. Eric Embry disqualify himself from considering the Appellant's pending application for rehearing, that the remaining Justices of this Court disqualify themselves as Justices considering the appellant's pending application for rehearing, for this Honorable Court to withdraw its opinion of December 7, 1984, which affirmed the verdict of the trial court, for the Clerk of the Supreme Court to certify the disqualifications of the Justices to the Governor of the State of Alabama in accordance with § 12-2-14, *Code of Alabama, 1975,* and for the special court to hear this case *de novo.*

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for the Appellant
3763 Professional Parkway
Mobile, AL 36609

By: /s/ PETER V. SINTZ
Peter V. Sintz

By: /s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of Feb. 1984, served a copy of the above and foregoing pleading upon counsel for all parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

/s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

REQUEST FOR ORAL ARGUMENT

The issues presented in this Motion For Disqualification And Motion For Withdrawal Of Opinion Of December 7, 1984 and For Hearing De Novo concern matters of first impression in the State of Alabama, have called to question the appearance of bias of all members of the Court, involve Federal Constitutional issues that affect these parties and the Alabama judicial system.

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

AMENDMENT TO MOTION FOR DISQUALIFICATION AND MOTION FOR WITHDRAWAL OF OPINION OF DECEMBER 7, 1984 AND FOR HEARING DE NOVO

COMES now the Appellant, AETNA LIFE INSURANCE COMPANY, and amends its Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984 and for Hearing De Novo by submitting the affidavits of Elsie Boros and George Heitz, which are attached hereto and marked as Exhibits "D" and "E" respectively.

RESPECTFULLY SUBMITTED.

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, Alabama 36609

By:
PETER V. SINTZ

By:
WILLIAM M. CUNNINGHAM, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of March 1985, served a copy of the above and foregoing pleading upon counsel for all parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

WILLIAM M. CUNNINGHAM, JR.

STATE OF CONNECTICUT)
COUNTY OF HARTFORD)

AFFIDAVIT

Personally appeared before me, the undersigned authority, this day came George R. Heitz and who after being first duly sworn does depose and say as follows:

My name is George R. Heitz and I am over the age of Twenty-One years. I am employed by the Aetna Life Insurance Company, of Hartford, Connecticut. My position is that of Legal Officer and in that capacity am knowledgeable of the Margaret Lavoie VS Aetna Life Insurance Company Lawsuit.

My first notice that Justice T. Eric Embry had filed a lawsuit against Blue Cross/Blue Shield on January 30, 1984 was by a tlelphone call from Mr. William M. Cunningham Jr., one of the attorneys with the firm of Sintz, Pike, Campbell & Duke, Mobile, Alabama engaged as the Defense Attorneys for Aetna Life Insurance Company in the Lavoie suit. This call was in the morning of February 15, 1985. Prior to that date I had no prior knowledge of the action by Justice T. Eric Embry against Blue Cross-Blue Shield or anyone else.

/s/ George R. Heitz
George R. Heitz, Legal Officer

Personally appeared before me, the undersigned authority, in and for said County and State, George R. Heitz, who being by me first duly sworn does depose and say that he has read the foregoing Affidavit and th the best of his knowledge the facts contained therein are true & correct.

Subscribed and Sworn to before me

this 6th day of March, 1985

/s/ Stephen Kushner
Notary Public

My Commission Expires Mar. 31, 1987

AETNA
EMPLOYEE BENEFITS DIVISION
Claim Department
Suite 600
No. 4 Metroplex Drive
P.O. Box 59180
Birmingham, Alabama 35259-9180

E. I. Boros
Manager
(205) 877-8416

State of Alabama, County of Jefferson

AFFIDAVIT

Personally appeared before me, the undersigned authority, this day came Elsie I. Boros and who after being first duly sworn does depose and say as follows:

I, Elsie I. Boros, am Manager of the Employee Benefit Claim Department. This department is responsible for all EBD claims in litigation against Aetna Life Insurance in Alabama, specifically is the handling office of Aetna Life Insurance Company for the lawsuit styled Lavoie vs. Aetna.

In my February 14, 1985 conversation with Mr. Cunningham, on that date was the first I had known of Justice Embry's suit and to the best of my knowledge, it is the first known that any employee had of Justice Embry's suit.

No one at our Home Office in Hartford, Connecticut had notified me of the lawsuit.

/s/ ELSIE I. BOROS
E. I. Boros, Manager

/s/ DARLENE R. JENKINS
Darlene R. Jenkins, Notary Public

My Commission Expires April 30, 1986

[SEAL] Subscribed and sworn to before me on this 6th day of March, 1985.

APPENDIX G

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

MOTION TO SUSPEND RULES AND MOTION FOR STAY OF EXECUTION OF JUDGMENT

COMES now the Appellant, AETNA LIFE INSURANCE COMPANY, and moves this Honorable Court in accordance with Rule 2(b), *Alabama Rules of Appellate Procedure,* to suspend the application of Rule 40, *Alabama Rules of Appellate Procedure,* and to grant the appellant leave to file the attached Second Application for Rehearing. Further, the appellant respectfully moves the Court for a stay of execution of its judgment pending the Court's determination of the Motion to Suspend Rules, or in the alternative, the appellant respectfully prays that this Court will advance the Motion to Suspend Rules on its docket so that it will be ruled upon prior to March 26, 1985. Should this Court deny the Motion to Suspend Rules, Appellant asks this Court to treat the Motion for Stay of Execution of Judgment as a Motion for Stay pending the timely filing by Appellant of a Jurisdictional Statement in the Supreme Court of the United States, such stay to continue until the disposition of this case by the Supreme Court of the United States in accordance with the rules of that Court. The attached affidavit of Stephen B. Middlebrooks is submitted in the event the Court denies the Motion to Suspend Rules. As grounds for said motion, the appellant states as follows:

1. That on March 20, 1985, the appellant, through the efforts of its attorneys, obtained a copy of the deposition of Justice T. Eric Embry in the lawsuit styled, *T. Eric Embry v. Blue Cross/Blue Shield of Alabama,* Civil Action No. CV-84-500-447, which action was filed in the Circuit Court of Jefferson County. (See attached affidavits marked as Exhibits 1 and 2 and attached letter marked at Exhibit 3)

2. That the testimony of Justice Embry in his deposition contains new evidence that this Court should consider with respect to Justice Embry's qualification to have participated and to continue to participate in the consideration and decision of the appellant's Motions, including appellant's Application for Rehearing, appellant's Motions filed in this Court on February 21, 1985, in this case, and these present Motions and Second Application for Rehearing. (Exhibit 4)

3. That a stay of the execution of the judgment pending final disposition of this Motion and the Second Application for Rehearing is necessary to prevent irreparable injury to Aetna Life Insurance Company should this Court's judgment in this case be reversed, and that a stay pending final disposition of a Jurisdictional Statement to be timely filed by appellant in the Supreme Court of the United States should this Court deny appellant's Motion to Suspend Rules or overrule appellant's Second Application for Rehearing is also necessary to prevent irreparable injury to appellant should this Court's judgment in this case be reversed. Conversely, the appellees' interests are fully protected by the supersedeas bond presently in effect and the additional supersedeas bond attached hereto and marked as Exhibit 5. The combined total of these bonds are in excess of ONE HUNDRED TWENTY-FIVE PERCENT (125%) of the total judgment, including interest and penalty.

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, Alabama 36609

Original Signed By:
By: Peter V. Sintz
PETER V. SINTZ

Original Signed By:
By: William M. Cunningham, Jr.
WILLIAM M. CUNNINGHAM, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of March, 1985, served a copy of the above and foregoing pleading upon Joseph M. Brown, Jr., attorney for appellees, by hand delivering same and to all other parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

Original Signed By:
William M. Cunningham, Jr.
WILLIAM M. CUNNINGHAM, JR.

Honorable Joseph M. Brown, Jr.
Attorney at Law
1601 Dauphin Street
Mobile, AL 36660

Honorable Charles A. Graddick
Attorney General
250 Administrative Building
Montgomery, AL 36130

Honorable Edgar M. Elliott, III
Attorney at Law
1700 Financial Center
Birmingham, AL 35203

Honorable James T. Upchurch
Attorney at Law
Post Office Box 270
Montgomery, AL 36195

Honorable Thad Salmon
Attorney at Law
2108 East South Boulevard
Montgomery, AL 36111

Honorable Lanny Vines
Attorney at Law
1800 City Federal Bldg.
Birmingham, AL 35203

Honorable Harry Cole
Attorney at Law
Post Office Box 116
Montgomery, AL 36195

Exhibit One

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

AFFIDAVIT OF WILLIAM M. CUNNINGHAM, JR.

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority in said State and County, WILLIAM M. CUNNINGHAM, JR., who after first being duly sworn by me doth depose and say as follows:

My name is William M. Cunningham, Jr., and I am one of the attorneys of record for Aetna Life Insurance Company in the above styled lawsuit.

On behalf of Aetna Life Insurance Company, I attempted to obtain a copy of the deposition of Justice T. Eric Embry, which was taken on January 10, 1985 in the following case: *T. Eric Embry v. Blue Cross/Blue Shield of Alabama,* Civil Action No. CV-84-500-447, which action was filed in the Circuit Court of Jefferson County. This office learned of Justice Embry's deposition on February 14, 1985. (See attached affidavit of Peter V. Sintz, marked as Exhibit "2")

On Monday, February 25, 1985, I made a telephone call to William G. Somerville, Jr., an attorney of record for Blue Cross/Blue Shield of Alabama in the lawsuit styled, *T. Eric Embry v. Blue Cross/Blue Shield of Alabama,* Civil Action No. CV-84-500-447. In that conversation, I asked Mr. Somerville if he had any objections to Aetna

Life Insurance Company obtaining a copy of the deposition of Justice Embry. Mr. Somerville advised me that he had no objections and that he would provide me with the name of the court reporter. I did not receive a return telephone call from Mr. Somerville that day advising me of the name of the court reporter.

I instructed my secretary to call Mr. Somerville's office the next day and learned then that the court reporter was Ms. Kathy Thames. I then instructed my secretary to call Ms. Thames and request a copy of the deposition. It was at this time that I learned that the deposition had not been transcribed, but that the per diem had been paid. At Ms. Thames' request, I authorized my secretary to advise Ms. Thames that we would pay for the transcription of the deposition in order that we might obtain a complete copy.

On Thursday, February 28, 1985, around 4:00 p.m., I was advised by my secretary that Ms. Thames could not provide us with a copy of the deposition. I then called Ms. Thames and she advised me that the secretary to Eugene Rutledge, attorney for the plaintiff in the *T. Eric Embry* lawsuit, had called her stating that no copy of the deposition could be provided to anyone and that Mr. Somerville had concurred in that request.

After this telephone conversation, I called Mr. Somerville and asked him if Justice Embry had mentioned the *Lavoie* case in his deposition. At that time, Mr. Somerville told me that Justice Embry had discussed the *Lavoie* case to some degree and that he could not agree to allowing us to obtain a copy of the deposition. He suggested that I discuss the problem with Mr. Rutledge.

I then sent a letter to Mr. Somerville by Zap Mail, a copy of which is attached hereto and marked as Exhibit "3".

Prior to dictating that letter, I attempted to call Mr. Rutledge to ask him if he would reconsider the instructions

his secretary had given the court reporter regarding the copies of the deposition. Mr. Rutledge was not in his office and was not to return until the following Monday. On the following Monday, which was March 4, 1985, I spoke to Mr. Rutledge, who advised me that he had no objections to our obtaining a copy of the deposition and that I could so instruct the court reporter. After talking to Mr. Rutledge, I called Mr. Somerville, who was not in, and advised his secretary that I had received permission from Mr. Rutledge to obtain a copy of the deposition and that if Mr. Somerville had any further objections, he should contact me immediately. I did not hear from Mr. Somerville.

I then called Ms. Thames and advised her that the objections to my obtaining the deposition by Mr. Rutledge's office had been released and requested that she please prepare me a copy of the deposition.

On March 8, 1985, the court overruled our application for rehearing and denied our motion for disqualification.

On March 20, 1985, the deposition was received in my office after being shipped by Ms. Thames to me on a bus lines, which was the fastest available means.

Prior to receiving the deposition on March 20, 1985, the only knowledge I had of the susbtance of the testimony of Justice Embry was Mr. Somerville's representations that Justice Embry had discussed the *Lavoie* case in the deposition.

FURTHER AFFIANT SAITH NOT.

/s/ William M. Cunningham, Jr.
William M. Cunningham, Jr.

Subscribed and sworn to before me on this 21st day of March, 1985.

/s/ Mary Ann Heyer
Notary Public

My Commission Expires 3-15-86

Exhibit Two

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

AFFIDAVIT OF PETER V. SINTZ

STATE OF ALABAMA
COUNTY OF MOBILE

Personally appeared before me, the undersigned authority in said State and County, PETER V. SINTZ, who after first being duly sworn by me doth depose and say as follows:

My name is Peter V. Sintz, and I am one of the attorneys of record for Aetna Life Insurance Company in the above styled lawsuit.

On February 14, 1985, after discovering that Justice T. Eric Embry had filed a bad faith lawsuit in Jefferson County, I called William G. Somerville, Jr., attorney of record for Blue Cross/Blue Shield of Alabama in that lawsuit and confirmed the existence of the suit. In that conversation, Mr. Somerville advised me that Justice T. Eric Embry's deposition had been taken and that in the deposition, Justice Embry memtioned the *Lavoie* case. He further advised me that the deposition had not been concluded and that it was continued generally, pending a possible settlement. Until I read portions of the deposition on March 20, 1985, I was not aware of the substance of Justice Embry's testimony.

FURTHER AFFIANT SAITH NOT.

/s/ Peter V. Sintz
Peter V. Sintz

Subscribed and sworn to before me on this 21st day of March, 1985.

/s/ Mary Ann Heyer
Notary Public

My Commission Expires 3-15-86

Exhibit Three

March 1, 1985

Zap Mail

Honorable William G. Somerville, Jr.
Attorney at Law
1700 1st Alabama Bank Bldg.
Birmingham, AL 35203-3272

Re: Embry v. Blue Cross/Blue Shield

Dear Bill:

This is to confirm my telephone conversation with you on February 28, 1985, around 5:45 p.m., wherein you advised me that you had no objection to the plaintiff's attorney's request that the transcript of Justice Embry not be released to anyone. Your reconsideration of this position is requested.

Around February 14, 1985, when we discovered that Justice Embry had filed a bad faith lawsuit in Jefferson County, my partner, Pete Sintz, called you to confirm the existence of that suit. In that conversation, you advised Pete that Justice Embry's deposition had been taken and that in the deposition the Justice mentioned the *Lavoie* case. On Monday, February 25, 1985, I spoke with you and asked if you had any objections to our obtaining a copy of the deposition. You replied, "No", and promised that you would provide me with the name of the court reporter.

My secretary called Ms. Kathy Thames on Tuesday and requested that a copy of the deposition be sent to us. Ms. Thames advised her that the deposition had not been transcribed, but that the per diem had been paid. She further advised us that we would have to pay for the original of the deposition since it had not been transcribed. After being advised of this, I authorized my secretary to order a complete copy and that we would pay any cost involved.

She called Ms. Thames and requested the deposition, advising her that we would pay the entire cost.

On Thursday, February 28, 1985, around 4:00 p.m., my secretary received a call from Ms. Thames advising that she could not provide us with a copy of the deposition. I called her and she told me that Gene Rutledge's secretary had called her stating that no copy of the deposition could be provided to anyone and that you concurred in that request.

Both, when Pete called you and when I spoke to you on Thursday afternoon, you stated that Justice Embry mentioned the *Lavoie* case in his deposition. We also discussed in our various conversations, our motion to disqualify Justice Embry from hearing the application for rehearing.

I am certain that you are aware of the seriousness of our motion, both to our client and to the judicial system. We must discover and consider all evidence that has an effect on our motion. Under Rule 31(f), an official (the court reporter) is to "promptly file" the deposition. There are also federal cases which speak to the fact that depositions are public records. Since depositions are to be filed and since depositions are part of the court record, you must agree that they are public records.

Our client has agreed to absorb all cost in the transcription of the deposition.

Since you originally had no objection to providing us with a copy, since we made the necessary arrangements to obtain the copy, and since the deposition is a public record, we must request that you reconsider your last decision and advise the court reporter to transcribe the deposition and provide us with a copy, or at least file it as required by 30(f)(1), Alabama Rules of Civil Procedure.

Due to the urgency of this matter, this letter is being sent to you by Federal Express Zap Mail and should arrive

before noon today. Please call me and advise me of your decision as soon as possible, so that we can advise our client of what action, if any, to take.

Sincerely yours,

WILLIAM M. CUNNINGHAM, JR.
For the Firm

WMCJr:ah
cc: George Heitz

Exhibit Four

[1] IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-84-500-447-JDC

T. ERIC EMBRY, ET AL, *Plaintiff*,

VS.

BLUE CROSS/BLUE SHIELD OF ALABAMA, *Defendants*.

STIPULATION

IT IS STIPULATED AND AGREED, by and between the parties, through their respective counsel, that the deposition of T. ERIC EMBRY may be taken before Kathie Thames, Registered Professional Reporter, Commissioner and Notary Public, State at Large, at 1300 Brpwn-Marx Tower, Birmingham, Alabama, on the 10th day of January, 1985, commencing at 10:00 A.M.

IT IS FURTHER STIPULATED AND AGREED that the signature to and reading of the [2] deposition by the witness is waived, the deposition to have the same force and effect as if full compliance had been had with all laws and rules of Court relating to the taking of depositions.

IT IS FURTHER STIPULATED AND AGREED that it shall not be necessary for any objections to be made by counsel to any questions, except as to form or leading questions, and that counsel for the parties may make objections and assign grounds at the time of trial, or at the time said deposition is offered in evidence, or prior thereto.

IT IS FURTHER STIPULATED AND AGREED that notice of filing of the deposition by the Commissioner is waived.

[3]

APPEARANCES

FOR THE PLAINTIFF:

Mr. W. Eugene Rutledge
Attorney at Law
Rutledge, Kay & Kelly
1300 Brown-Marx Tower
Birmingham, Alabama 35203

FOR THE DEFENDANT:

Messrs. Henry E. Simpson
and William G. Somerville, Jr.
Attorneys at Law
Lange, Simpson, Robinson & Somerville
17th Floor
First Alabama Bank Building
Birmingham, Alabama 35203

ALSO PRESENT:

Pam Blalock
Gray Till

[4] I, Kathie Thames, a Registered Professional Reporter of Birmingham, Alabama, and a Notary Public for the State of Alabama at Large, acting as Commissioner, certify that on this date, pursuant to Rule 30 of the Alabama Rules of Civil Procedure, and the foregoing stipulation of counsel, there came before me at 1300 Brown-Marx Tower, Birmingham, Alabama, commencing at 10:00 A.M., T. ERIC EMBRY, witness in the above cause, for oral examination, whereupon the following proceedings were had:

T. Eric Embry,

being first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. SIMPSON:

Q. Judge, the court reporter has asked usual stipulations. Do you want to waive the signature or not?

MR. RUTLEDGE: Yeah, we waive.

Q. Give me your full name, age and address.

[5] A. My full name is Thomas Eric Embry, E-m-b-r-y, and I live at 3609 Springhill Road, one word, Birmingham 35223.

Q. Is your Social Security number 418-12-2167.

A. Yes.

Q. Would you give me your date of birth, please?

A. 6-14-21, June 14th.

Q. And your deceased wife's name was Bedford Stall Embry?

A. Right.

Q. And did she die on September the 20th?

A. 20th, '83, yeah, '83.

Q. Do you have any dependents presently?

A. Well, not legally.

Q. You had two daughters?

A. Yeah.

Q. Are those both grown?

A. Yeah. Thirty-seven and thirty respectively, and five grandchildren.

Q. In so far as your Blue Cross, state any type of insurance coverage?

[6] A. No dependents.

Q. Would that be true for the year commencing October of '82 also?

A. Yeah. No, '82 I had a wife living.

Q. Other than Mrs. Embry?

A. Yeah, right.

Q. You have produced certain things here pursuant to our notice of deposition and I have, maybe I ought to ask counsel, are these extra copies?

MR. RUTLEDGE: Yes. Those are yours.

Q. As far as the tax returns?

A. I got all I could find.

MR. RUTLEDGE: Are those different years. Hand me one copy.

Q. You have produced a portion of your '83 and your '82 and your '81 federal and '79 and '78 federal tax returns?

A. And '80 I couldn't find.

Q. Maybe we just ought to have this group of documents.

(Whereupon, Defendant's Exhibit 1 was marked for identification).

[7] Q. Looking at Defendant's Exhibit 1 if your counsel will let you look at it with him over there, as I understand the term, you took no deductions for medical expenses in 1983, is that correct?

A. I don't really know because these things are prepared for me by Kenneth Carnethan, accountant, and he usually just questions me and he decides whether to deduct or not, so whatever it shows on the return is what I did.

Q. I presume you sign your returns?

A. Yeah, sign them.

Q. And if you would look there with me so we can eliminate this issue. On your 1983 return, does it, on line seven does it shown a zero deduction?

A. Schedule 8-A?

Q. Yes.

A. Zero.

Q. And according to your understanding would that be where you would show a deduction for medical expenses if one had been taken, was your answer in the affirmative?

[8] A. Yes.

Q. Now, if you would, turn to 1982.

A. Okay.

Q. And at that time you show in that same position, although it's numbered differently on the '82 form you show one hundred fifty dollars deduction?

A. Line ten, schedule A, correct.

Q. Does that represent the allowable amount of deduction for hospital insurance, is that the origin of that deduction?

A. No. As I recall it, of course, I say I rely on them on the tax part, it's the amount that was expended in excess of certain percentage of gross income, as I understand it.

Q. All right, sir. Then look at the schedule that accompanied your '82 return for itemized deductions for medical and dental expense.

A. Okay. Medicines and drugs?

Q. Yes.

A. On one twenty-four sixty-eight fifty-five. I don't know what this is, federal [9] one percent.

MR. RUTLEDGE: That is the computation.

Q. That is the computation based on your gross adjusted income, is that what line two is, is that your understanding?

A. I guess so. I don't really understand it. I ain't much on mathematics or taxes.

Q. And then on line four there is a figure of eight hundred sixty-two dollars and sixteen cents under total insurance premium paid for medical and dental care?

A. That is the dependent's coverage under the Blue Cross state employees.

Q. Is there any other cost in there?

A. Yeah, there was a policy, I still have, with American Family Life in Columbus, Georgia, cancer policy. I think that was seven dollars a month, I believe, at that time. I'm just guessing at that because I get those figures from our clerk's office and turn them over to the accountant.

[10] Q. Was there any other insurance premium that you can recall?

A. Not medical.

Q. So that eight hundred sixty-two dollars and sixteen cents, according to your best recollection.

A. That is Blue Cross and American Family Life.

Q. Do you remember the dependant's monthly premium cost for the state plan at that time?

A. No, the clerk would give me a slip of paper, Mrs. Barnes keeps the books for the court for that yearly and I would turn it over to him. She showed so much a month, so many months, it's currently one hundred fifty-six dollars, but it wasn't that much in '82.

Q. What, was that deducted from your check?

A. Yeah, part of those deductions for pension and whatever, withholding tax.

Q. Have you kept your—the check stubs?

A. I got check stubs going back down [11] to——

Q. Checks payable to you that were itemized deductions from your check?

A. Oh, no. I think my secretary may have those vouchers. No, I don't have them.

Q. Now, the fourth line there is what we just discussed?

A. Right.

Q. And you have, in line five you have put down five hundred and thirty-one dollars for doctors, dentists and hospitals. Was that the total amount of expenditures that you deducted for 1982?

A. The work sheets are with the accountant. I don't know what it represents.

Q. Is it your understanding that that was the total amount?

A. He computed it, so I suppose it's accurate.

Q. Then there is a deduction from those totals entitled medical reimbursement, one thousand eight hundred ninety dollars and sixty-four cents. Do you know the origin of [12] that figure?

A. Yeah.

Q. What is that?

A. It's from Blue Cross for major medical claims for prescription medicines and certain portions of doctors bills.

Q. All right. Can you tell me, Mr. Embry, is that amount of money that you received back personally or was that an

amount of money that is composed partially of payments made by Blue Cross on your behalf to provide——

A. No, that would be money that came to me by check that I would enter on the bottom part of the check from Blue Cross, they have a thing showing what it went for, what to reimburse you for and I would put income on that and turn it over to the accountant.

Q. Let me, if I may, go back to item one then.

A. Okay.

Q. Is it your understanding of the two thousand four hundred sixty-eight dollars and fifty-five cent figure that that includes the [13] total amount that was expended by you and on your behalf or on your wife's behalf for medicines and drugs?

A. No.

Q. That was simply the amount?

A. What I had a record of.

Q. Let me ask you, what I'm trying to get at, is that the amount that you had to pay separate and apart from any sums that were paid directly by Blue Cross?

A. Right.

Q. So that two thousand four hundred sixty-eight dollars—Mr. Rutledge wants to speak to you.

(Off-the-record discussion.)

Q. On the record. I wanted to ask you, I think you remarked to Mr. Rutledge, you said that your wife's cancer was diagnosed in March of '83?

A. Yeah.

Q. Do you know what doctor made that diagnosis?

A. Yeah. Well, initially out at [14] Brookwood Hospital, a young Dr. Blanton, his partner, Jimmy Buschnell had put her in there. She was bleeding from the nose and throat. We thought, I may be corrected, that it was due to all the medication she had taken over the years, those blood vessels being brittle. But this diagnosis, I took her out of Brookwood and Dr. O. W. Clayton did a biopsy on her at Baptist Montclair and Dr. William Howley took over the chemotherapy and the radiation at Baptist Montclair.

Q. Did the cancer have any specific diagnosis?

A. Yeah, it was where the bronchial tube enters the lung.

Q. Let me call your attention to line five, five hundred thirty-one dollar figure, is that the amount for doctors, dentists and hospitals that you personally paid other than——

A. That is part of it.

Q. Well, does that include any sums which were paid on your behalf by Blue Cross or [15] any other insured?

A. No.

Q. On your 1981 return that also shows on schedule A one hundred fifty dollar deduction under line ten, does it not?

A. Here on the left hand side, yeah.

Q. And on the schedule it supports that you had supplied us for the year 1981 under line one you have one half of insurance premiums but not more than one hundred fifty dollars.

MR. RUTLEDGE: He is on the next page.

A. I see.

Q. That is the caption of line one and you have one hundred fifty dollars?

A. Well, that would be the maximum, I take it from the form.

Q. Right.

A. I don't recall, no.

Q. Do you know what insurance premiums that you had?

A. That would have been the same two I mentioned earlier, American Family Life and Blue Cross.

[16] Q. Was it, in other words, your dependant's payment?

A. Yeah. It would have to be that.

Q. Because——

A. That is the only medical insurance we had. Well, now, wait a minute, '81, I don't know whether I had the cancer policy, I probably did, but it was either one or both of American Family Life or Blue Cross.

Q. And would your answers concerning line two, the medicine and drug expense and line six, the other medical and dental expense be the same as it was for the year 1982?

A. Sure.

Q. In other words, those were amounts that you expended directly, not amounts that were expended on your behalf?

A. That is correct.

Q. And the reimbursement figure that is shown there, one thousand six hundred five dollars and nineteen cents would have been money received directly from you?

A. By me.

[17] Q. And you assumed from—and you assume from Blue Cross?

A. Had to be.

Q. You have on line 5-A, and the figure for insurance premiums, balance of seven hundred fifty dollars and eighty-four cents?

A. I don't know what that, if it says maximum was one hundred fifty what would premiums on five be, I don't know. The accountant may know. I don't understand that.

MR. RUTLEDGE: Well, you add one hundred fifty and do you want me to say?

A. I don't understand, but maybe y'all do. I don't know what the hell it is.

MR. RUTLEDGE: You add this figure to the seven hundred fifty figure and get it.

A. If you say so.

Q. Do you follow Mr. Rutledge's advice on all matters?

A. No, I don't understand this thing. I don't understand taxes so I never file on a return.

Q. Did you take the subject of taxation [18] when you were in law school?

A. Hell, no.

Q. Did you graduate from law school?

A. Yeah.

Q. I thought you went to the University of Alabama?

A. I did. I didn't take fool things like taxation, though. Let the folks with mathmatical bent minds do that.

Q. Look at your '79 return there.

A. Okay. They change the form every year, I guess.

Q. On schedule A of your '79 return which is denominated on that form schedules A and B——

A. Right.

Q. Under medical and dental expenses you have under line two a figure of medicine and drugs of one thousand six hundred eighteen dollars and eighteen cents. Is that your understanding of the——

A. That which I could verify.

Q. And would that have been medicine and [19] drug expense that you incurred directly for you and your wife rather than what was reimbursed?

A. Yeah.

Q. The same as for line six, the doctors and dentists, is that your understanding?

A. Right.

Q. And you show there reimbursed by insurance nine hundred eight dollars and eighty-seven cents?

A. Well, he's got a parentheses with a minus. I don't understand what the hell that means. I tell you, he is deducting that instead of showing it as income. He is deducting that, I suppose is what he did.

Q. And looking now to the form '78, the form seems to be the same as it was in '79. Was your understanding of the same figures?

A. Right.

Q. The same as it would be?

A. In those various itemized lines, I mean numbered lines.

Q. There does not appear to be a figure there for reimbursement from the insurance [20] company. Do you know whether—do you see it there?

A. I suppose, because, I could only guess as to why it didn't show up in '78.

Q. What would be your judgment?

A. That was in October, late October of that year was when I had sort of a heart attack or whatever you call it, and those claims didn't get filed and reimbursements made until the following year. I suppose that is the answer to it.

Q. Would those claims have been filed under the state plan as far as you know?

A. Yeah. Well, in Montgomery initially, the hospital there and they transferred me here by ambulance to University Hospital and I stayed there until right before Christmas. Then later during Christmas I went out to Beaumont, Texas to see doctor—oh, great big fellow, Joe Reeves.

Q. And you went to Texas to be treated?

A. Beaumont, yeah.

Q. Now, Judge, when did you become a [21] state employee?

A. The 20th day of January of 1975.

Q. And that is when you were elected to the court or that is when you took office?

A. That is when the term of my office began at 12:01 midnight.

Q. Were you ever a state employee prior to that time?

A. Well, when I was eight years old I was a page in the legislature.

Q. How much did you get paid?

A. I got paid the huge sum, and you better believe it was huge in 1931, fifty-four dollars every two weeks. I saved it all, too.

Q. Who appointed you as a page?

A. Finis St. John's grandfather from Cullman who had

no legs, but he had two wooden legs. He was a great friend of my mother, he put me on.

Q. Did you miss much school as a result of that?

A. No, mother had been a school teacher and she told the school system at Pell City that [22] she would keep me current so when I came home on the weekend she would make me do my damn lessons and turn in my homework. I didn't like it much, but that was the condition.

Q. Your father was at the legislature at that time?

A. No, he had been in the legislature in 1923 and he was lobbying, believe it or not, for Associated Industries.

Q. Anybody else?

A. Not that I know of. Had a great time.

Q. Other than that have you had any employment by the state?

A. No.

Q. Were you ever, before we had the passage in the judicial article, did you ever hold a county office?

A. No. When I was practicing law my daddy was county attorney, but that is not an office. St. Clair County.

Q. You were never deputy soliciter?

A. No, my father was. He had been circuit soliciter, but he resigned.

[23] Q. You have never been a judge of an inferior court?

A. No. This is the—unless it's the one I'm on. Some fellows have said it's inferior.

Q. Did Mr. Rutledge say that to you?

A. No, I don't think so, not in public.

MR. RUTLEDGE: Not outside the attorney/client privilege.

Q. Now, you have also produced here a—two folders?

A. I don't know what is there. I turned them over to Gene.

MR. RUTLEDGE: Those are not copies, so whatever you want out of that we'll be glad to copy for you.

A. They appear to be what, previous claims and communications from Blue Cross.

Q. Is this everything that you have that will——

A. Up to the date that that, and more of the same in my file over at UAB, but it doesn't, you know, it post dates the filling of the [24] lawsuit.

Q. All right. Let me——

MR. RUTLEDGE: You want me to run all that for you?

MR. SIMPSON: I'll let Bill Somerville look at it and he can decide on that.

Q. You have an office at UAB?

A. Yeah, yes, sir.

Q. What is that over there?

A. That is 9012 South 15th Street, Building Number 4, Room 101-A.

Q. Do you have a secretary in Birmingham?

A. No, I have a staff attorney here.

Q. Do you have any other residents, part-time residents other than the Springhill address?

A. No. I did have in Montgomery, but when my wife died I gave it up.

Q. And could you give me that address in Montgomery?

A. I was fearful you were going to ask that. Two hundred and something South Bainbridge Street, Apartment Number 1. Half of [25] an old house. Belonged to Chief Justice Ansel's widow.

Q. Did you rent that?

A. Rented it.

Q. And did you—do you have any vacation homes or addresses?

A. No. Can't afford that.

Q. During the two year period that is apparently the subject matter of your suit, you did stay in Florida quite a bit, I think with your wife, didn't you?

A. Not in Florida.

Q. Some of the claims came from St. Petersburg, Florida.

A. St. Pete. Are you sure you are not talking about New York City?

Q. Believe me, I am not——

A. I don't know because——

Q. Don't presume that I know any facts about it.

A. She had twenty-four years of her medical problems, a lot of surgery. Most of which occurred in New York City. St. Petersburg, [26] Florida, I shoot a blank on that.

Q. When is your re-election date?

A. January the 17th or 18th or 19th, one of those three days, it falls after the first Monday after the second Tuesday or what ever it is, 1981.

Q. It's a six year term?

A. Yeah.

Q. Is it your present intention to run for re-election?

A. I don't think that is any of your business.

Q. Do you have a present intention?

A. I don't know whether I do or not.

Q. I gather from that that you don't think that being a Supreme Court justice has anything to do with this litigation?

A. No.

Q. You have made no public announcements about your intent?

A. No. I don't give much concern with those kinds of things.

Q. At the time you became a judge in [27] 1974 did you have any health or hospital or disability insurance policy?

A. Oh, yes.

Q. Do you know who they were with?

A. Well, we went, you know, because of the wife's chronic illness over the years and my own surgery and illnesses before my heart attack, the office had had group policies with Aetna, with St. Paul, Mercury, with New York Life, there is a reference to some of those in this old file. I stripped this file, but there is correspondence with different companies. And Blue Cross also. Those are the only ones I can remember.

Q. Okay. Did you have a Blue Cross policy when you went on the bench?

A. Yeah.

MR. RUTLEDGE: Are you talking about——

A. I had a contract, yeah, so-called private contract.

Q. Do you remember what type of contract that was?

[28] A. I can remember it's type A, seems to me, whatever the hell that is.

Q. Do you remember what the amount of the deductible was?

A. Fifty dollars. No, twenty-five way back then. See,

my mother—subscribe to Blue Cross in 1935 you got to get five families and she rounded up us and four others.

Q. Then as far as you know were you a Blue Cross insured from the time your mother took out that policy in '35 up until the time you went on the bench in '74?

A. Yeah.

Q. When you went on the bench in that——

A. See, that was in addition to the group policy at the office.

Q. All right. In other words, let's talk——

A. At the law office.

Q. Let's talk about the year '74. Is it your recollection you had an individual policy?

A. That is right, with dependent's coverage in '74 would have been only the wife.

[29] Q. You also had group coverage with your law firm?

A. With one of those various companies that kept—they didn't like to write them because of my illnesses and my wife's kicked the rates up on the others and they would swap and get another company.

Q. All right. So you don't remember who that insurer was?

A. I named those from time to time.

Q. Could you give me those names?

A. Let me see if I can find a reference to them in here. Okay. This is—let me see now, this is '73. Guardian. That was who the policy was with at that time.

Q. Would you give us that full name?

A. The Guardian Life Insurance Company of America, Incorporated, State of New York it says on the form. And

let's see if I can go back, go up in time, if that is what you want.

Q. Give me the dates, if you can ascertain them.

A. This claim that I'm looking at was [30] filed on January the 22nd of '73 for epidural, block, hospital for special surgery in New York and there was a claim filed on 9-21-72 for anterior spinal fusion L4 and 5 for my wife that had taken place on 8-30-72 and the, this was some follow-up something or other. I think an attempt to get some relief from the continued pain because the fusion didn't really work well. None of them did, seven of them.

Q. Seven, your wife had seven fusion operations?

A. Yes. Well, she had ten procedures but seven of them were for fusions.

Q. How many—have you had a back fusion?

A. No, I had a fatty tumor in my small intestine in 1963 in March. That was removed and then I had an interstitial hernia from coughing, had to go back in July and have that repaired. Looks like Guardian—no, the last one we had was New York Life, I believe. Here is June 13th, '71 she was admitted, special surgery. She had a hematoma in her right leg, [31] phlebitis. And I say her, we say we had an individual Blue Cross, like I thought I recall at the time. Let's see, Guardian, '71.

Q. You have now handed me a card issued June 1, '71 by Blue Cross which refers to a CN6 type contract number 301222, is that correct?

A. It says conversion on contract number all waiting periods served. I suppose, I think they came out and issued a new policy, a new certificate on the previous one. The old computer could tell you that. This is mine, it's Beaumont, Texas, I believe it is. Here is the surgery on me.

Q. What date is that, Judge? It appears to be March 20th, '63?

A. Yeah.

Q. Is that the surgery by Dr. Patton?

A. Yeah, Dr. C. B. Patton.

Q. Is that the only surgery that you have ever had?

A. No, I had an appendectomy when I was thirteen years old.

Q. Have you had any since 1963?

[32] A. I had that interstitial hernia repaired in July, went back in. It ripped loose inside when I was coughing from pollen. I had never been allergic to a damn thing up until that time. These are all records. If they have any significance just tell me.

Q. Well, what my question was that got us on this track was what insurance policies you think you had in '74?

A. Looks like Guardian and Blue Cross.

Q. And New York Life?

A. I don't know why I don't find any reference in this file because I stripped these files of everything except what I thought was significant as a medical record after the wife died, all the correspondence and stuff that deep, indicating six to eight inches, and so that is why I can't pinpoint and I don't have it. These just show things of a diagnostic nature and surgical procedures so that I would have it when I was in some hospital they wanted to know about my history, see.

Q. Did you ever file any type of lawsuit [33] against any of those insurance companies?

A. No, no, I don't think so.

Q. Other than this lawsuit have you ever filed a lawsuit?

A. I have sued some clients for fees, but that is with the firm. Damn if I remember filing a lawsuit. I can't recaall. I may have, but I don't think so.

Q. Did Mrs. Embry ever file a lawsuit, to your knowledge?

A. Yeah. What started her problems was a woman rear ended her up there on North Woodward Road back in 1960, I believe it was, seems like it was November of '60, she had a riding group, little bitty kids taking them to kindergarden, she was going west and this woman coming from the east watching a full grown tree in front of a residence hit her and knocked her twenty-five feet in a Valiant and the kids went around like the lottery balls, not a damn scratch on them. And she didn't think she was hurt except she couldn't get up the next morning, couldn't move her neck. That started her [34] problems. The only successful fusion she had was in the surgical spine.

Q. And a lawsuit was filed as a result of that?

A. Yeah.

Q. Did you file a loss of services claim at that time?

A. I'm sure I must have. Herbert Peterson and Jim Haley represented her.

Q. In the prosecution of that claim?

A. Yeah. Huie, Fernambucq handled the defense.

Q. Can you recall any other lawsuit Mrs. Embry filed?

A. No.

Q. When you went on the bench——

A. Oh, yeah, wait a minute. There was a mink coat missing out of the house and we keep looking—I keep looking for it after she died and made a claim with Maryland Casualty and they ignored it and I filed suit for that. It was a schedule, two thousand dollars and somehow the

agents had never turned it over to the claims [35] department. I don't know what happened, but we settled it. They paid the two thousand and a fee.

Q. Approximately what year would that have been?

A. It had to be in '84. Filed it in the district court up here.

Q. Jefferson County?

A. Yeah.

Q. Who represented you?

A. Lee Reeves. He worked for me when I was practicing law. He is over at Sirote, Permutt. Cliff Reeves' son.

Q. Clifford Reeves was your law associate at one time?

A. In a sort of fashion. He had space in our offices.

Q. Did you sue for bad faith?

A. Yeah, sure as hell did. Got that fee.

Q. And that would have been a suit in your name?

A. Yeah.

Q. Didn't file any type of class action?

[36] A. No, no. They just goofed up like the casualty companies do, and other companies.

Q. In other words, you think they were just negligent?

A. They were. They just, it got in some bin with all these tons of paper that float around all over the place and was ignored, but that got their attention, they were very nice about it.

Q. Is it your understanding in a tort of bad faith that a negligent breach of contract constitutes——

A. I don't know, I would have to look it up.

Q. Have you ever written an opinion in a bad faith claim?

A. I think I have.

Q. Do you recall that case?

A. I have written several of them, but names of cases, the most recent one I can recall is the procurum opinion, Aetna Life Insurance Company versus Levoy. But I had to write a procurement because I cited one of my dissents.

[37] Q. Explain that.

A. I had dissented in an early case in bad faith about a standard of evidence and all that, but I didn't prevail, but it also had some beautiful language in it otherwise, so I have made reference to it in the Levoy opinion.

Q. And for that reason the opinion is procurum rather than——

A. Right. That plus I took it over from another judge. It's customary a lot of times in procurum, if it's been assigned to you because the other opinion didn't prevail, I learned that. None of this stuff is written down, though.

Q. Just custom?

A. Yeah, it's always been done this way, so we do it.

Q. Do you recall, I know we can find the exact date of the issuance of the opinion, but do you recall when you wrote the Levoy procurum opinion?

A. It's on rehearing right now. So the opinion came out right before Christmas or right after Christmas. It was right before Christmas, [38] I guess.

Q. Do you know when the opinion was written?

A. Published?

Q. No, not published, when you wrote it and before it was circulated.

A. I wrote on it for eight or nine months.

Q. And that would have been the first eight or nine months of 1984?

A. Yeah. See, that case is history. It's first submitted on briefs.

MR. RUTLEDGE: He didn't ask you that.

Q. Well, go ahead.

A. That is extraneous stuff.

MR. RUTLEDGE: You are heading toward getting a judicial interpretation in this one. Somebody is going to have to order to give you Judge Embry's interpretation.

A. I don't know what it is.

Q. Do you recall the date that it was submitted to the court, approximately?

A. Not originally.

[39] Q. Would it have been prior to January 1st, 1984?

A. Oh, hell, yeah.

Q. And before your counsel interrupted you you were telling me——

A. It was submitted and argued over and resubmitted.

Q. And have you got any judgment as to that, would it have been as long ago as '82?

A. Well, no, no. Well, I don't remember but it's been a long time.

A. It's been up there four times.

Q. And was your——

A. We are talking about the last admission now.

Q. Was your—when you first started writing on the opinion in that case was it a—you thought it to be a dissenting opinion, did I infer that?

A. Yeah, yeah.

Q. And do you—can you tell me the approximate date of when that became the majority?

[40] A. Oh, yeah. Back in about November, December of this past year.

Q. As I understand what you have said, the case was taken under submission without oral argument originally?

A. Ori ally. The last appeal resubmitted on brief.

Q. And was it on the court's motion that it was set down for argument?

A. Yeah, after discussion it was deemed appropriate to unsubmit it, whatever you call it, set asside submission, order it argued orally so the lower court could hear it and resubmit it after that.

Q. And do you recall when, approximately when that, let's call it the order of resubmission or unsubmission?

A. Back in the spring, as I recall, of '84. Because I know it was argued before the summer recess. We don't have a recess, but before the last of the oral arguments held in June, normally, sometimes it will go to the first week in July.

[41] Q. Had there been drafts of an opinion before the decision?

MR. RUTLEDGE: Justice Embry, let me tell you that I do not think you should be disclosing the——

A. I don't think so. I hadn't thought about it. That is part of our—even though we've had some groups that want to open up the conference room to the press——

(Off-the-record discussion.)

MR. RUTLEDGE: I don't know——

A. That is correct.

MR. RUTLEDGE: I don't know what your objective is, and I'm very, very reluctant to ever instruct a witness not to answer a question, but I have—it's my understanding that the negotiations among the judges, if that is the right terms, are confidential and without some showing I don't intend to allow Judge Embry to discuss how a certain opinion came to be written.

A. So far all I have stated was the mechanical, but that is as far as I will go.

Q. And you have given me your best [42] recollection about the dates?

A. Correct.

Q. And that was the case of Aetna Life Insurance Company V. Levoy, that was the style of the case?

A. Right.

Q. You have mentioned to me that you gathered up these documents and have shown us here, I haven't had a chance to look at all of them, did you do anything else in preparation for this deposition?

A. No.

Q. Didn't review any other written material other than what is here?

A. No. I read some stuff at his request.

Q. What did you read?

A. His memorandum.

Q. Legal memorandum in this case?

A. Yes. He wanted me to have an idea of what the case was about.

Q. Now, when you went on the bench in January of '75 did you cancel any insurance coverage?

[43] A. No, it was a roll over, I would call it, I would say came under the group deal rather than the individual Blue Cross contract and, of course, I was no longer covered by Guardian or New York Life, whoever had the office group, no, not health insurance, if that is what you are talking about.

Q. How about disability insurance?

A. I have disability, income disability policy with Paul Revere.

Q. Do you recall approximately how long you have had that?

A. Oh, goodness, well, I had it for several years while I was practicing law because it's the type thing you draw so much money a month in the event you can't perform the usual duties of the occupation or in the case on me being on the bench, the normal duties of your office.

Q. Have you ever made a claim or received any benefits from that policy?

A. No.

Q. Did your wife ever receive any [44] benefits from a disability policy?

A. Didn't have any, she didn't have any policies for disability.

Q. We've talked about a group policy that you had through your office as being a Guardian or New York Life policy, did you attempt to roll that over or renew that when you went on the bench?

A. No. If you are not in that group, as I understood it, you can't qualify. I suppose you could have gotten a private contract with them, I suppose, I don't know.

Q. Now, when you went on the bench in '75 do you know

who, what insurance company, if any, administered the state plan?

A. I don't know. Mr. Thrasher testified about all that. I don't really know. I know when I went on the court the card didn't have anything on it except Blue Cross.

Q. Did that subsequently change?

A. I'm sure it did because the card I have now shows this, whatever it's now called, something about state employees health insurance [45] plan or something like that. I don't seem to have it.

Q. Do you know whether the state plan has been administered by Blue Cross the whole time you have been on the bench?

A. I don't really know that. I would be just supposing and whatever, so I better not get into that.

Q. Your income tax returns indicate that you have made claims on health insurance carriers from the year '78 forward.

A. Well, long before that, but I didn't have those returns. I couldn't find 1980's.

Q. But would it be your recollection that for every year since 1975 that you or your wife had made a claim or had benefits paid on your behalf by a health insurance carrier?

A. Oh, hell, yeah.

Q. Did you, as I understand your lawsuit, you're seeking recovery for damages suffered for——

A. I think the lawsuit speaks for itself.

Q. Right. From October 1st, 1982 [46] forward, is that correct, till the time——

A. If that is what is alleged.

Q. Did you ever have any difficulty with processing claims prior to the date?

A. Jesus Christ, that is a silly question. For years and years. When your daddy was representing them he suggested I sue them back in 1978, '77, somewhere along in there.

Q. And that is when you were on the bench?

A. No, '60, what am I talking about. Because old Miller, I went over there to see him.

Q. You went to see Mr. Miller in '68?

A. Yeah, because they presented me with a bill in New York for seven thousand dollars, said my amount of days had expired, which hadn't. I told them to hold it and I called your father about it. He said I can't make them do anything. Miller was the executive vice-president, as I recall it, and I went over there and talked to him about it. He said blame it on computer, as usual, said he would write the New York Interplan Bank. I said no, you call them right [47] now, so he called and got it straightened out.

Q. Were you paid the full amount of the hospital charges or a portion?

A. Well, they paid the hospital charges on the regular, see, I didn't have any major medical, I had Guardian on that. This was just a straight hospitalization policy. It wasn't Blue Shield. That was for one week in the hospital.

Q. And this, you mentioned the Interplan?

A. Bank.

Q. Bank?

A. That is what he called it.

Q. What is your understanding of that?

A. It's some sort of exchange, like if you get sick in New York, as I understand it, Alabama Blue Cross covers you and they make payment through this Interplan bank or fund or whatever the hell it is in turn New York City Blue Cross, as I understand it pays the hospital.

Q. And did you threaten to sue Mr. Miller or Blue Cross at that time?

A. No, I just let him have a piece of my [48] mind.

Q. What did you say to him?

A. I told him it was a hell of a note to get up there and wife lying there helpless and be presented with a bill when you knew you had the coverage and this was just a ploy to stall and hold on to the money, which it was.

Q. That is what you told Mr. Miller in 1968?

A. Yes, sir.

Q. And it was your understanding at that time or your belief at that time that that was a device by Blue Cross to hold on to the money?

A. Looking back on it.

Q. Well, did you tell Mr. Miller that?

A. I said you are stalling to hold on to this damn money because you see I had gone up there and she had been diagnosed and the fellow wanted to do the surgery in 1967, these dates could be a year or two off, and I said no, we run out of, she had been in the hospital here, I said our seventy days will be up in four our five days. I said you schedule for the [49] following year in the new seventy days, so he did and we went back the following year, after the calendar year had started running where we had the full seventy days, because I couldn't afford to pay it out of my pocket at those prices, even in those days.

Q. And this was on your wife's surgery?

A. Yes. The next surgery.

Q. And as I understand it——

A. No, this may have been one of the back surgeries.

Q. But her eligible hospital days had been expended for one calendar year?

A. Short five days. So we began the new calendar year and scheduled the surgery for the following year.

Q. You rescheduled it?

A. I think one of these things show January the 21st or 20th, something like that.

Q. And——

A. So that would have been the back.

Q. And did you express to Mr. Miller or any other representative of Blue Cross in '68 [50] that it was your belief that——

A. I just said it looks to me it's just an effort to delay payment. I didn't really get angry about it, I was upset because, my God, all the money I had spent over the years on hospitals and doctors and all, the whole family, and I wasn't in a position to pay that bill at that time. I would have had to borrow the money.

Q. Can you recall anything else you said to Mr. Miller?

A. That is about the substance of it. I don't remember the exact words. We had a very pleasant visit.

Q. You mentioned you discussed that with my father.

A. Yeah. I called him.

Q. Did you have any other discussion with him that you haven't told us about that claim?

A. No, I had called him because I informed——he was the general counsel, and he and I were friends and I asked

him what could I do about it and he said we had a conflict, he [51] suggested I go over and see this fellow.

Q. As far as you recall Mr. Miller is the only person you talked to?

A. Yeah, in his office. It was over there on 20th Street at that time.

Q. Now, did you have any other difficulty with any type of hospital or medical insurance or health insurance claim?

A. Not with other companies, no.

Q. Never had one with any other company?

A. No.

Q. Had no——

A. They were helpful and prompt, they would help you process a claim, as a matter of fact.

Q. Under the state plan, after you became a judge under the state plan can you recall the first time that you had any difficulty?

A. Every time you file a claim it was all forever processing, but also this business of need more complete information, this, that and the other when all the damn information had [52] been furnished, but also little things like inadvertently put my Social Security number on a claim instead of four eighteen I just put three eighteen. Well, hell, y'all probably got four or five disks of computer records over there of me and I got that thing back says can't process the claim without more complete information.

Q. Do you recall when that occurred?

A. It was one of those claims arising out of my wife's—after she was dead, but see, the radiation, as I recall it, they threatened to sue me, the radiological people because Blue Cross hadn't paid them, so finally I sent them a form and asked them to fill out and send it to me. That may or

may not have been the one that was kicked back, but they dribbled that stuff in me in forty or fifty dollar lots and there was three thousand and some odd dollars. I would get a check for one hundred fifty or two hundred dollars every two or three weeks. Went on forever. That is when I started getting angry about it.

Q. And that would have been sometime [53] after your wife's death?

A. Yes. It's been last year, early part of last year.

Q. Well, suit was filed?

A. I'm trying, you know, the last radiation she had was in early September or late August and that last chemotherapy treatment, which was a precautionary follow-up thing is what killed her, but it was claims arising before that because claims of the losses incurred as a result of her last two or three days last illness. They were paid rather promptly comparatively.

Q. Those were claims that you said were paid rather promptly would have been in——

A. For that intensive care isolation deal.

Q. Treatment rendered in '82?

A. No, treatment rendered immediately prior to September 20th.

Q. I see, immediately prior to her death?

A. Yeah.

Q. So, as I understand it, some of the [54] claims from the fall of '83 were paid promptly and others were not?

A. No, the ones that had been incurring, see, she went for radiation three or four days a week for, oh, God, I don't know how many months and those things were, the radiological group were filing those things all along, at least I was assured they were. I had no buzz out of them

until all of a sudden I got past due and all that mess, several thousand dollars and then I don't know whether I talked to anybody at Blue Cross or what, but then when I got the thing, kept saying past due and, of course, that is when I said, well, look, let me send you a form and you fill out one of these major medical claim forms, put all the stuff on it and I'll file it, and as I recall that was what was done.

Q. All right. In this particular claim was for the——

A. Radiation therapy.

Q. Administered by, you said the radiologist?

A. Dr. Dick over in the—what do they [55] call that thing, there is a unit over there in Baptist Montclair that they don't—it's not the regular x-ray outfit, it's therapeutic x-ray.

Q. Is it in the doctor's office building?

A. No, it's in the hospital, but this Dr. Dick is the head of it.

Q. Nuclear?

A. Yeah, nuclear because they have cobalt.

Q. Is Dick D-i-c-k?

A. Yeah, he was a little bitty fellow, balded.

Q. Now, you have mentioned radiology group. Is it your understanding——

A. That is the unit in the hospital. The radiology group that serves the hospital, of course, they have lab facilities in the hospital, that is a different deal. That is for, you know, upper GI series or whatever.

Q. I'm going to come back to this, but before we get off of it, the specific claim that you say that you got a past due notice on, was that from Baptist Montclai. Hospital?

[56] A. From the nuclear medicine or whatever it is in the hospital.

Q. Was it your understanding that it was from the hospital itself or was it from a group of doctors?

A. I don't know what the setup over there is. Usually the bill shows on it something like Baptist Montclair nuclear radiology group or something like that, but it's not just the people that take x-rays. These are therapeutic. They bill you separately. The hospital doesn't bill you for that.

Q. Do you have a copy of one of the bills so I can get that name?

A. Is that that stuff that Gene had?

Q. Yes.

A. Let me look in that and see. Probably one of those claims.

(Recess.)

Q. Did you—while we took that break did you find the name of that group?

A. It's right there on top.

Q. All right. Show it to me, if you [57] would.

A. Okay. Baptist Medical Center outpatient therapeutic, that just describes the service, I suppose. I think it's the next page. Birmingham Radiological Group, P. A.

Q. And that is the group?

A. Professional Association, I take it because it shows outpatient x-ray therapeutic.

Q. And is that the group that sent you the past due notice, as far as you can recall?

A. Yeah.

Q. Is Dr. Dick that you mentioned a member of that group?

A. No, he is a member—it may be that the same group operates the regular x-ray, if that is the name of that group, but this is a separate unit and Dick is the head of it.

Q. What is his first name?

A. I don't know.

Q. Now, if I can go back——

A. John or Jonas.

Q. You told me about the difficulty you had in 1968 involving——

[58] A. Or thereabouts.

Q. Involving the New York plan. Incidentally, you said my father told you to sue. He didn't tell you to file a claims suit, did he?

A. We didn't discuss it, but in Alabama at that time we didn't have any of these damn fool rules.

Q. That you are now utilizing?

A. Yeah.

Q. It's apparent you don't have to do that any more, do you?

A. No, write a letter.

Q. Now, Judge, between that incident and the time you went on the bench in January of '75 do you recall any other difficulty you had in any claims processing with Blue Cross or any other?

A. Just slow, slow pay, slow reimbursement.

Q. Did you have any difficulty with Guardian or New York Life that you recall?

A. No.

Q. Do you recall having any [59] correspondence with either of those companies concerning claims?

A. I don't think so, because they had local agents, I remember, well, Wilmar Point, he was the head of Guardian and they would come to your office and help you with it or tell your secretary how to do it.

Q. And this was junior or the third or fourth?

A. Third.

Q. He is the one who is now deceased?

A. No, young fellow whose picture you always see in the New York Life adds, billion dollar round table, whatever they call it. A fine young fellow.

Q. By young you mean his early forties?

A. Younger than I am.

MR. RUTLEDGE: My age.

Q. Judge, prior, we've discussed, then, the only, the difficulties you had prior to January of '75. Can you tell me about the specifics of any difficulties that you had with health insurance claims between January of '75 [60] and September 30th, 1982 and with whom?

A. Blue Cross.

Q. All right. With any health insurance?

A. Well, that is the only one I had except the American Family, American Family paid very prompt.

Q. Well, let me ask you this, you remember the dates I gave you were till September 1982?

A. Yeah.

Q. Did you have a claim with American Family prior to that?

A. No, I thought you were talking about the last year.

Q. Concentrating, if you will, in January of '75 and September of '82, do you have any recollection of having any difficulty of any health insurance claims processed in that period of time?

A. Through Blue Cross.

Q. Can you recall when that——

A. Well, see——

MR. RUTLEDGE: Let him finish the [61] question.

A. All right.

Q. The specifics of any of those, specifically the dates?

A. No, I don't remember the dates. It was just a running deal because I have these chronic ailments, so does Bedford, my wife, and go to the doctors, and on a couple of occasions had to be hospitalized. See, I have got a hiatal hernia and esophageal spasma sometimes and it's the same old story forever and two days and on occasions there will be this business of incomplete information over what is the diagnosis, and, of course, it's all on record. Hell, I can list what is on the old records, hypertension, angina, hiatal hernia, hormone deficiency and some other damn fool ailment. Gout and a few others. Just old age.

Q. Is it your judgment, then, that there were difficulties in every year from 1975 up until September of '82?

A. Yes, sir. They are the same nature.

Q. Of the same nature?

[62] A. Yeah.

Q. And the same, by the same nature you mean slow pay?

A. Delayed payment or reimbursement on occasions, silly kickbacks for the information that is already in your files, but I would dutifully send back the information.

Q. During the time between January '75 and September

'82 were the difficulties that you had any more pronounced in any particular year or do you have any recollection of that?

A. The things most vivid in my mind is claims arising from her cancer, my wife's cancer.

Q. You told me now that was diagnosed after?

A. I don't remember the date.

MR. RUTLEDGE: He is asking you right now about through September, '82.

A. Oh, '82, same that I have chronicled.

Q. During that period of time did your wife continue to receive treatment in New York?

A. No, I think the last time we were in New York was '79 or '80, I don't——

[63] Q. Mr. Rutledge is becoming impatient with me, but I want you to concentrate between——

A. I'm concentrating.

Q. Listen to me. Time frame.

A. I'm bad not to listen.

Q. Lawyers are worse, aren't they? January of '75 when you went on the bench through September of '82.

A. All right.

Q. Now, during that period of time did Mrs. Embry receive treatment in New York?

A. No.

Q. Did you?

A. No.

Q. Do you recall any out-of-state medical treatment during that period of time?

A. September '82, '75, yeah, Beaumont, Texas, I'm thinking of myself now, but Bedford, no, I don't think we took her to New York after I went on the bench, I couldn't afford it on salary.

Q. An expenditure of several thousand dollars would be a major expense to you, is that [64] what you are saying?

A. Well, I don't know, I have spent over three quarters of a million dollars since she first got hit in 1960 on her illnesses.

Q. So——

A. And expenses incident to it that are not reimbursed by insurance, hotels, air transportation.

Q. So an expense of two thousand dollars would be a major expense to you as a salaried person, would it not?

A. At any one moment writing a check for to two thousand dollars, I could go in savings.

Q. Can you tell me again, getting back to this time frame, '75——

A. '75, '82.

Q. Was the difficulty in processing claims any more pronounced or can you remember any specific incidents of difficulty.

A. Delay in payment and the kickback on need further information crap.

Q. Would it be your testimony that that difficulty was level throughout that period of [65] time?

A. Chronic, all the time.

Q. You noticed no dramatic improvement or worsening of the service during that period of time?

A. Seemed to get worse. That is the impression I have

because it got longer and longer and it's been pretty bad since I filed this lawsuit.

Q. Is whatever information that you have concerning those prior claims, whatever document that you have in these two files that you have?

A. All I have. Of course, their computer has it all.

Q. I'm particularly interested in claims with other insurance companies.

A. I don't have any. You are talking about that time frame, American Family——

MR. RUTLEDGE: Well, he is asking you about September, '82.

Q. Is it your understanding or your recollection——

A. Okay.

[66] Q. —that during that time frame, '75 to '82 that the only health coverage you had was through the state employees' plan?

A. Except for the cancer policy.

Q. Except for the cancer policy?

A. Right.

Q. Did you read any description of your plan before this deposition?

A. No, not recently.

Q. You have given me a blue book?

A. Well, that is not the current one, I don't think.

Q. You say it has an effective date. What is it?

A. 10/1/82. This is the same content, well, there was one change that isn't mentioned in here, no, it is mentioned in here. This occurred after 1980, this claim filling limita-

tion, three hundred sixty-five days, that is the only change I noted in the phamplet. Of course, I took a glance at the policy.

Q. When did you do that?

A. It's been several years ago. You [67] have a claim service officer on South 20th Street and I used to take these claims there rather than mail them. There is a nice young lady up there that is very efficient and all and she sent them out and whatever. And I had not known of that thing and she explained it to me, I said well, that is the first I had ever heard because at that time it wasn't in the then current pamphlet, so she went back in the back there and got a big old thing about that long and about that thick which was the master policy, or the policy.

Q. The policy——

A. And she showed that provision that had been put in at some point.

Q. You referred to the policy. Are you referring to some type of contract with the state insurance.

A. No, it's a contract between Blue Cross and the state employees. It's group number thirteen thousand.

Q. All right. Now, the provision to which you directed my attention is lawyers [68] health insurance plan booklet appears on page seven and refers to a limitation that claims for benefits must be submitted no later than three hundred sixty-five days following the date covered expenses are incurred?

A. The loss, yeah.

Q. And do you recall approximately when you had this discussion with the young lady?

A. I have no idea.

Q. It would have been sometime prior to October 1st, 1980?

A. Is it '80 or '82. Look here, the card.

Q. I'm looking at the card, but I'm looking here at the date of the health insurance plan.

A. I had not seen it in the previous phamplet. As a matter of fact, it wasn't in the previous phamplet because I know someone who filed a claim and picked up back expenses that was four or five years old.

Q. Who is that?

A. Judge Almond. His wife died of [69] cancer after a long, long, long illness and his secretary made belated claim and collected.

Q. Do you recall, I think she died in '79?

A. I don't remember, because I never knew his first wife. He was on the court of criminal appeals at the time so it had to be before '79 because he came on our court in '75, the same day I did.

Q. So it would have been sometime before '75?

A. Yeah.

Q. And the provision to which you directed my attention——

A. Claim limitation.

Q. And it does appear in the employees health insurance plan booklet which was distributed to you by the state and had an effective date of October 1980 on it?

A. I didn't get it at that time. I had to request it much later.

Q. From whom did you request it?

A. I'll tell you when I requested it was [70] the date of that card.

Q. Now, you have shown me a card?

A. I put scotch tape on it.

Q. Scotch taped to the book that shows your contract number and an effective date of October 1st, 1982, is that correct?

A. The occasion for the request was when I talked to the young lady on South 20th Street and she showed me the provision in the group policy. When I got back to Montgomery I requested an up to date phamplet.

Q. Did you have——

A. Certificate or whatever you call it.

Q. Did you have claims denied on the basis of that limitation?

A. I don't recall. I know I have had the new deduct imposed each year, an additional two hundred dollars when she was living.

Q. Other than that, looking at the planning at that time, which apparently would have been in October of '82 or thereabouts?

A. I don't remember. Time fleets by.

Q. Have you read the, either the policy [71] contract with the state——

A. No, the only thing I have consulted since that time that I saw it up there was this thing here, this phamplet.

Q. This phamplet. Who did you receive that phamplet from?

A. I don't know, I just asked my secretary in Montgomery to get me one and I think the Clerk's office distributes those, I am not sure.

Q. The clerk of the Supreme Court?

A. Yeah.

Q. What is your secretary's name?

A. Mrs. Mildred Gandy.

Q. And has she been with you the entire time you were on the bench?

A. Yes. She was with Judge McDaul and I kept her.

Q. How did you receive notice about the cost of the dependants coverage under the state plan?

A. They distribute these, hell, paper, when I do go to Montgomery there is a stack of [72] damn paper on my desk that has been distributed in the previous week and we always get these memos and it's always something to do with effective such and such a date, dependent coverage to be increased or whatever. It's just a paper world.

Q. And then that would be deducted from your check, is that right?

A. Not now, no.

Q. You pay that independently?

A. No, I don't have any dependents.

Q. I understand that, but when you did have dependent coverage?

A. Came out of payroll deduction.

Q. And you personally have not, since you have been on the bench have not made any payments for your personal coverage, is that correct?

A. No, I wouldn't have any personal coverage, if you mean a private contract aside from the group.

Q. It is a fringe benefit to you as your employment as a judge, is that correct?

[73] A. I imagine what you would call it is a part of your compensation, I suppose.

Q. Is that, do you know, is there any question as to whether or not that——

A. As far as IRS is concerned, no, I don't know.

Q. All right. And do you know——

A. Other than what Thrasher said.

Q. Do you know whether or not there has ever been any consideration as to the, whether any variations in that coverage constituted an increase or decrease in your remuneration for any purpose?

A. I don't really understand the question.

Q. Well, you know, you are aware that an elected official can't have an increase in salary under the Constitution of Alabama?

A. No, that is not true, judicial. You are thinking about the Boutwell Amendment, you know, the judicial article, we are not bound by that.

Q. Tell me how your compensation——

[74] A. If we are lucky enough to get a raise, which is unlikely, we get it during our term.

Q. How is your compensation fixed?

A. By statute.

Q. You told me that it can be varied?

A. Per annum.

Q. Per annum?

A. No, they varied it by Fiat, cut me out of seventeen hundred dollars that I'll never recover because the computer screwed up.

Q. Talking about Judge Haley's decision?

A. Yeah, his damn fool decision, he took care of trial judges, screwed us.

Q. All right. But otherwise how is judicial compensation set?

A. By statute, so much per annum.

Q. Are you telling me that that cannot be varied other than by a subsequent legislative act or is there a board, compensation board?

A. Well, we've got an increase by luck as state employees proviso to exempt us from the increase was taken out so we got the ten percent that the other state employees got effective, I [75] don't know——

MR. RUTLEDGE: I don't mean to interrupt, but if the statute says he can or says he can't, whatever he says wouldn't add anything to it.

A. I'll have you to refer to the statute.

MR. SIMPSON: Gene, he's not claiming any damages from loss of compensation in this suit, is he?

MR. RUTLEDGE: Well, I don't know whether he is or isn't, but the point I'm trying to make with you is his view as to how the judicial is compensated or isn't, unless it's in an opinion he writes it doesn't mean anything.

MR. SIMPSON: Unfortunately I haven't got anybody else I can ask these questions of.

MR. RUTLEDGE: You have the statute and the cases. That is a matter of law, not fact. I'm not trying to be argumentative. We could be here for a month.

Q. I'm trying to limit the——

A. Suits me, this is better than working.

Q. I'm trying to limit the issues if we [76] can get the parties to agree on them. You are not claiming that your compensation has been altered as a result of any action on the part of Blue Cross or the State Employees Insurance Board?

A. I'll have to refer to the complaints. I gave all these facts that I knew to Mr. Rutledge and he represents me. His theory of law and all is what I'm traveling under. I don't have any independent thoughts about it.

Q. Do you know of any evidence of any kind that would bear on the issue of whether or not your salary or compensation has been effected in any manner by the actions defended in this case?

A. That would depend on an analysis of the entire scheme of the package of compensation consisting of stated salary plus these, what you refer to as fringe benefits and the effect of the defendant's actions on the cost of that to me and to other state employees.

Q. All right.

A. That is the best way I know to answer [77] it.

Q. Do you know of any evidence that the actions of this defendant have effected?

A. It would be in your company file.

Q. I'm asking what you have knowledge of.

A. I don't have any knowledge of it because I made an analysis of it.

Q. So you have no such evidence?

A. I would have to have all of y'all's records.

MR. RUTLEDGE: There is a follow-up of the question—that is all right.

Q. Is the answer to the question no, you do not have any evidence one way or another?

A. If you are talking about sitting here in my possession, in my knowledge without digging into all these records and all of yours and the state's, no.

MR. RUTLEDGE: And excluding from your answer anything I have done in preparing for this case?

A. That is work product of us, that is not my deal, I just give you the facts and you [78] work it out.

Q. That is all I want is the facts. You don't know of any facts?

A. I have got a lawyer to represent me. I don't represent myself, that is crazy.

Q. You are in Montgomery a fair amount of time and you are down there and under the workings of how state employees salaries are effected and do you have any facts?

A. I don't know how the system works.

Q. You have never had anybody telling you that your salary has been highered or lowered as a result of any action on the part of any defendant in this case?

A. No one has told me anything. What I have been able to find out I have to dig for it.

Q. You have never seen anything in writing that increased that conclusion, your salary had been effected one way or another by the action of this defendant?

A. I think what you are asking me calls for a legal conclusion and I ain't going to make a legal conclusion because I am not the judge or [79] jury.

Q. Have you seen anything in writing and discussed in any manner——

A. To the effect or conclusion——

MR. RUTLEDGE: Let him finish the question. Go ahead.

Q. —discussed in any manner the administration of the state employees health insurance plan or the, any actions or costs of Blue Cross/Blue Shield of Alabama on——

A. No.

MR. RUTLEDGE: Wait a minute, Judge.

Q. —on the level of compensation which you have received?

MR. RUTLEDGE: Are you excluding from your question, Mr. Simpson, work that I have done in preparing this case for trial, which I may have shown my client or are you including that?

MR. SIMPSON: I'm including that.

MR. RUTLEDGE: Well, we refuse to answer the question because that would call for disclosure of my work product in your [80] questioning the witness. If you will exclude that I'll have no objection to it.

MR. SIMPSON: Well, Gene, I don't want to exclude any document which you have shown him. I'll include that any do ument prepared by your counsel.

MR. RUTLEDGE: Well, if you will exclude from your question anything that I have prepared or had prepared by persons I have retained for that purpose to be used in the trial of this case, then we'll answer the question. If you include that I'll instruct the witness not to answer.

Q. I'll exclude anything that has been prepared by Mr. Rutledge or which he has prepared. You remember, Judge, my question pertained to documents.

MR. RUTLEDGE: Do you understand, Judge?

A. I think so. No.

MR. SIMPSON: I think at this time we probably ought to break for lunch.

MR. RUTLEDGE: That is good.

[81] (Lunch recess.)

Q. Judge, during the lunch break we have had an opportunity to look at these two files which you produced. Do these constitute all the documents?

A. All I got left.

Q. All right. And by all the documents I mean any correspondence or records of medical records or claim forms or anything relating to the medical claims involved in this lawsuit?

A. For that period of time.

MR. RUTLEDGE: That he has?

A. That I have.

Q. Do you have any others that are available to you from any other source?

A. Unless he has some more in his file and like the 1980, or '81 tax return, I don't know where it is.

MR. RUTLEDGE: Let me state, as far as I know this is all we have in our possession, but I am not representing that the letters haven't been written or claims haven't been made that are in there because that would be in your [82] records probably better than ours.

Q. All I want to know——

A. There are more documents but those are all I can find at this time.

Q. If we are going to see any more——

A. If I'm instructed to rummage through all my papers at home and stuff——

MR. RUTLEDGE: If we find any more documents we'll give them to you in plenty of time.

A. Right.

Q. Have you made a search for what you think to be relative documents?

A. This morning I was running late and I have been cleaning out my house ever since Bedford died and, my

God, I have never seen as many papers in my life and I found these in different places.

Q. There do seem to be a fair amount of documents relating from September, '82 forward and do you know of any other place where any other might be?

A. I have some subsequent to, well, it [83] covered last year at the office over at UAB. They are copies of claims for medication and doctors services for me.

Q. I think those are called for by the subpoena.

MR. RUTLEDGE. Henry, I'll do the best I can.

A. I can't get my staff attorney on the phone.

MR. RUTLEDGE: If you will let me answer, I'll do the best that I can. This is what part of this has been brought to me over a period of time, this being the fat folder. This was brought in this morning. I do not know of any other documents that we have at this time. That's all I know to tell you.

MR. SIMPSON: Well——

MR. RUTLEDGE: But I am not saying that somewhere in the Judge's house or in his office or someplace on earth he may not have other copies. What I am saying to you is that you have got them at your place.

MR. SIMPSON: Well, Gene, our request [84] isn't related to solely communication with Blue Cross. It includes that, but could be others. As I understand it, the judge has said that he does——

MR. RUTLEDGE: What representation can I make to you that will be satisfactory? Judge, will you search?

A. Yeah.

MR. SIMPSON: What the judge said, he does have other documents for last year, that is '84.

MR. RUTLEDGE: Do you want those?

MR. SIMPSON: Well, I take it that it's the judge's position that it wouldn't be relevant since it came after the suit was filed if you are not seeking damages for anything after the suit was filed.

MR. RUTLEDGE: Get the documents, we'll have them to you in the morning, or do you want them right now?

A. I looked at that subpoena notice.

MR. RUTLEDGE: Well, all I want to do is get on here.

[85] A. Sure.

MR. RUTLEDGE: Do you need them right here?

MR. SIMPSON: I wanted them as soon as you can get them.

MR. RUTLEDGE: I'll have them in the morning.

Q. Now, Judge, I have asked you about the medical records.

A. Do you have any documents of any kind relating to correspondence between yourself or your counsel and any other members of your class?

A. No.

Q. None at all?

MR. RUTLEDGE: Never been none from counsel.

Q. All right. I don't intend for you or your counsel to be bound by any characterization I made about the averments of the complaint, but for purposes of attempting to shorten this I'm going to ask you some questions. I understand that you did not necessarily concur in my characterization, portions of the complaint [86] section damages for claims which you made which were unpaid between September and, or after September, '82. Do you—can you list or denominate those particular claims which you claim are unpaid?

A. No. They would be reflected by some unpaid, small ones, usually, but more particularly by less than full payment

Q. All right. And that is——

A. Full reimbursement.

Q. Let me narrow it now to claims that were submitted and no portion of the claim was paid. Are there any such claims?

A. Yes. I can't detail them.

Q. You can not give me the details?

A. No.

Q. And then there is another section of claims in which less than the full amount was paid and it is your contention that the full amount was due to be paid?

A. Well, the full amount under the terms of the contract.

Q. All right. And are there—do I [87] understand that your complaint states other claims that were paid but were tardily paid?

A. As I recall

Q. All right. Are you seeking personal damages from any such claims that were paid——

A. Personal and for those members of the class that are similarly situated that had claims that were not paid or delayed pay.

Q. You are making a claim for damages personally?

A. My claim is in there with everybody else, I guess.

Q. What I want to know, Judge, I'm trying to determine what type of claim you had. Are you making a claim that a claim was properly submitted and you suffered damages as a result of it not being paid on a timely basis?

A. Right.

Q. Now, insofar as the contract count of your complaint is concerned, and I'll——

A. Do you see the contract?

MR. RUTLEDGE: Let me get a copy of it.

[88] Q. Judge, have you read a copy of the complaint in this case?

A. I saw it before it was filed. As a matter of fact, the same day.

Q. Have you read it since?

A. No.

Q. Are you generally conversant with what it claims?

A. I would have to look at it to refresh myself.

Q. Please feel free to do so.

A. If you would prefer some particular part of it.

Q. All right. Count one of the complaint has, in paragraph two has four subparts.

MR. RUTLEDGE: You mean paragraph ten.

Q. Paragraph ten. Judge, do you see subparagraph A, B and C of paragraph ten there?

A. I did.

Q. And those, in determining what damages that you have suffered under each of those three categories, I take it we will have [89] to examine the particular claims, is that, do you know of any other way to do it?

A. No.

Q. Now, ——

MR. RUTLEDGE: Let me state for the record, how I prove this case won't be governed by Judge Embry's views of it,

it will be how I decide to do it. I'm of the opinion we are about to enter an area of complaint interpretation that in my judgment a client is not in a position to do. I don't want to instruct the witness not to answer, but I do want the record to be clear that we'll not be bound as to meet orders of proof by the answer just given by Judge Embry or any other answer, but if you want to examine him about what the complaint says go ahead, over my objection.

Q. Judge, as far as any documents that you have that relate to your personal claims fall within categories A, B and C of paragraph ten of count one, they are here in these two folders and what you might bring us in the morning?

[90] A. Right.

Q. Do you have any documents or have you seen any documents which in any way relate to subparagraph D of paragraph ten of count one of the complaint?

MR. RUTLEDGE: Do you include or exclude from that question, any documents which I have prepared through this litigation or have had others prepare at my request for preparation at trial?

MR. SIMPSON: I would exclude any that you or your designees have prepared for use in this litigation. I do not exclude any that they might have consulted, any preexisting documents.

MR. RUTLEDGE: You can answer with that clarification.

A. No.

Q. Do you have a judgment—let me withdraw that.

A. I don't have any judgment.

Q. Are you the executor of your wife's estate?

[91] A. Yeah.

Q. Is that still pending or is that closed?

A. Yeah, I'm executor, yeah.

Q. And——

A. No, it hasn't been completed.

Q. That is pending in the Jefferson County Probate Court?

A. Yes.

Q. Are you attempting in this suit to assert any claim for damages which would be recoverable by your wife's estate?

MR. RUTLEDGE: We object to that question because that would require a legal interpretation of facts applicable to them and that is not Judge Embry's function in this case.

Q. All right. Now, Judge, I'll ask the same question, but I'll exclude as a class representative, I'll simply ask you if you are seeking recovery of damages for payment of your wife's estate?

A. I can't answer because I don't know what Mr. Rutledge's theory of the case and how [92] he attempted to prove it.

Q. Are there any medical claims pending against your wife's estate?

A. Against it?

Q. Yes, have any claims been filed in the probate court?

A. No.

Q. All right.

A. Not of any kind.

Q. Have, since the wills were granted have you as an executor in your capacity as executor paid any claims?

A. Medical or hospital claims on behalf of the estate?

MR. RUTLEDGE: As executor of the estate?

A. As executor I have only paid for the funeral expenses

and headstone, things associated with her death, but not medical, but I don't recall at the moment whether I reimbursed myself for having paid for them. The undertaker, and you know how slow lawyers move on these things, so I think it went on and paid [93] it.

Q. Is the estate represented by counsel?

A. Yeah.

Q. Who is that?

A. Danny Markstein and there is a young man in his office that is working with him, Jim Vann, James Vann.

Q. Are there other legatees or beneficiaries of that estate other than yourself?

A. Not now, not at the present. My children were—well, it was a trust and my children have, I don't know what you call it, but they have relinquished their interest to me, so that the truth did not have to be, come into being.

Q. Were you trustee of that?

A. No, Bernard Stein was trustee.

Q. Judge Embry has produced two manila folders, I'm going to put with the Judge's permission, number one and number two on the folders and on number one I'm going to write Defendant's Exhibit 2.

A. And on number two you will put [94] Defendant's Exhibit 3.

(Whereupon, Defendant's Exhibits 2 and 3 were marked for identification.)

Q. We'll put a tag on them later and counsel have agreed that these will be reproduced by counsel of the plaintiff and made exhibits in mass. First thing in Defendant's Exhibit 2 is the employers health insurance plan, State of Alabama, which, to which we've previously referred.

A. Right.

Q. You have placed on the front of that with scotch tape your eligibility card dated 10-1-82, is that correct?

A. Right.

Q. Did you have a similar card for preceding periods?

A. I'm sure I must have.

Q. And you have previously testified that you examined a portion of this booklet—let me withdraw that and let you tell me again, whether or not you have read this booklet and if [95] so when you did.

A. As I recall, what I have stated earlier, was after presenting some claims up at the South 20th Street office and being shown that particular provision, I procured a copy of the then current, now current, I assume still in force, certificate or explanation, pamphlet type of thing that you have in front of you, of the employee's health insurance plan.

Q. And so that would have been sometime after October the 1st, '82 or do you know?

A. Yeah.

Q. All right. Prior to that time had you read the contract between Blue Cross and the state?

A. You mean the contract itself?

Q. Yes.

A. No.

Q. Had you read anything?

A. One of these things, one of those phamplets.

Q. Is that all you had read?

A. Yeah.

[96] Q. Is that all you have read to date?

A. Well, I have seen that contract on the occasion I described earlier this morning, but just with the particular reference to the provision about the claim limitation three hundred sixty-five day period.

MR. RUTLEDGE: Again, just for clarification it would call for—excuse me.

(Recess.)

Q. Judge, so, if we can get a complete answer, as I understand, the only document that you have read relating to any type of contractual relationship between Blue Cross and the state employers insurance board or the state employers health insurance plan——

A. And me.

Q. Or you, with the exception of that limited perusal at the south side office, is this booklet that I'm——

A. I have stated that three or four times.

MR. RUTLEDGE: Wait a minute.

Q. Your counsel disagrees.

[97] MR. RUTLEDGE: Are you excluding from that reading my client and I visiting together and going through a various document, because if you include it I'm going to instruct him to exclude it from his answer.

Q. I'm including any document you have read, any contractual document you have read.

A. I——

MR. RUTLEDGE: We'll not include interviews with me in which documents have been reviewed in any answer or have not.

A. No, I wouldn't tell you about that.

Q. You wouldn't?

A. No.

Q. Don't think that is personal?

A. That is my lawyer's work and me working with him.

Q. What I want to know, quite frankly, is what knowledge you had of the contractual relationships between the defendant and the state before you filed this complaint on behalf of all state employees.

A. I had information about it and it [98] turned out mostly accurate.

Q. What was that information?

A. I haven't done it from documents.

Q. Where did you get that information?

A. People.

Q. Who?

A. I don't know. But when I got kind of interested in this I started——

MR. RUTLEDGE: Wait a minute. Let him ask you another question.

Q. Go ahead and tell me where you procured any information that you had that forms the basis of your complaint.

A. I couldn't tell you other than here and there.

MR. RUTLEDGE: Once again, are you excluding informaton that I have gathered following in the course of preparing the complaint and prosecuting this case?

Q. No, I am not excluding that.

MR. RUTLEDGE: Let me say this, that we are not going to voluntarily testify about interviews and what was done following [99] interviews prior to the preparation of the complaint and information that I have given the judge and the attorney/client privilege, either. If that is what

you are after, then you will have to get that some other way than a voluntary answer on this deposition.

MR. SIMPSON: Let me state that it is pertinent in determining whether or not he is an adequate class representative as to when and what investigation he has made as to the allegations involved in the complaint.

MR. RUTLEDGE: It seems to me, Henry, that if information was obtained as a result of my being retained to look into this matter and that I obtained information and share it with the judge, then that attorney/client relationship, that that is not discoverable by you and I would reluctantly insist to know that point.

Q. And you are instructing him not to answer?

A. I won't answer whether he instructs me or not.

[100] MR. RUTLEDGE: If you want to ask him what information he has obtained from other persons outside of that attorney/client relationship, fine, but of course, I am not going to tell you, have him sit here and tell you what my investigations have revealed in the course of preparing this case, of course, I am not.

MR. SIMPSON: Well——

MR. RUTLEDGE: Class action or no.

Q. I'll insist on an answer and I understand that you are not going to answer, is that right?

A. No, because——

MR. RUTLEDGE: No, just say no.

A. No.

Q. I'll ask the question as phrased by your counsel. What information have you received from any other source other than from your counsel concerning the allegations in the complaint?

A. I got leads from people that I put him in touch with.

[101] Q. Tell me who you talked to and from whom you received those leads.

A. I didn't talk to anyone.

Q. Did not talk to anyone?

A. I had people communicate with me.

Q. You received the information from some source, would you tell me what the source is?

A. I got a letter from a fellow, I don't remember who it was, but I turned it over to the lawyer and he followed up on it.

Q. Was this after the time of the complaint?

A. Yes, it was.

MR. RUTLEDGE: Well, we are not going to break down that sort of thing. I'll just, in order to make the record perfectly clear if you want the court to review it, I do not intend to allow the judge to voluntarily testify about when we had interviews and how we developed our case and who we talked to, either. If you want that then that will have to do it another way.

Q. I understand counsel's position and [102] what you have said you are not going to let him testify about what he knows about the allegations and complaint.

MR. RUTLEDGE: That is not what I said.

MR. SIMPSON: I'll come back to it. I'm going to insist on the question as phrased.

Q. Judge.

A. Yes, sir.

Q. We got into this by my asking you if you had ever read any of the contractual documents between the state

employees insurance board, employees health insurance plan or any state employee and defendant in this case. I'll ask you that question again and I'll first limit the time to prior to the time that you filed the complaint.

A. Documents?

Q. Yes.

A. No, personal, no.

Q. And did you have anybody read a document to you?

MR. RUTLEDGE: I instruct the witness [103] not to answer that question to the extent that it involves conversations between witness and me within the attorney/client privilege.

Q. Prior to the filing of the complaint did anyone read to you any contractual documents?

MR. RUTLEDGE: Again, same instructions.

Q. The second item in Defendant's Exhibit 2 is simply an adding machine tape. Do you——

A. Oh, that came out my little old thing. Who in the hell are these people? This is my handwriting. Oh, I know now what that note meant.

MR. RUTLEDGE: Are you asking about the adding machine tape or something else?

A. There hasn't been a question, he just showed me. You can clip it to it or scotch tape.

(Off-the-record discussion.)

(Whereupon, Defendant's Exhibits 2-1 and 2-2 were marked for identification.)

[104] MR. SIMPSON: Counsel have agreed that with respect to Defendant's Exhibit 2 we'll attempt to put in the bot-

tom right hand corner of each document a 2-1 so that we can refer to these serially at some later date.

Q. I show you what has been marked as 2-2, Judge, and ask you if you can explain that to me?

A. It's a so called claims summary on Blue Cross' form with some notations in my handwriting which appear on it.

Q. And the first thing that appears to be in your handwriting is the date of March 9, '83, is that right?

A. Now, and that is about the time she was diagnosed as having cancer, she being my wife.

Q. And you note that you received a check in the amount of three hundred eleven dollars and forty-three cents?

A. The check was in payment of prescription medicines.

Q. All right.

[105] A. I think entirely. And that is Ritch's Pharmacist is what that is.

Q. Is it accurate to state that everything that was printed was sent by Blue Cross and everything that is there I think you prepared?

A. That is exactly right.

Q. There is a statement in Blue Cross' print that the claim was processed on March 3rd, 1983. Is it your understanding that that is on or about the date that you submitted the claims that are reflected on this 2-2?

A. No it would have been submitted before that time.

Q. Do you have any judgment as to how long?

A. No. The information I put on it obviously relates to what the monies, three eleven thirty-four totaled partial reimbursement of and I'm pretty damn sure you have to exclude the bottom of it, I think positive these were for medications because it shows right here.

Q. All right.

[106] A. That is the 2nd of January of '83.

Q. And of the amounts of the prescription medications, that is the first three items that you submitted you were paid eighty percent?

A. Yeah, looks like it. I don't have any calculator.

MR. RUTLEDGE: That can't possibly be right of this figure right here.

MR. SIMPSON: Well, Gene, we are talking about the top three.

A. That is——

Q. The thirty-two dollar hospital stay. Now, Judge, the first one shows April '82 through August 9, '82. Were you in the habit of gathering up and submitting a group?

A. Usually quarterly.

Q. Was it your recollection that you did submit at one time a group of pharmacy charges that range from April 6th, '82 until August 9th, 1982? You can refer to your notes.

A. You will see a pattern. I would have to go through each of them to show you that [107] pattern.

Q. And if you do want to refer to any other document——

A. I don't need to at this point.

Q. Is it your recollection that you did submit a group of charges that incurred between those two dates?

A. I can only rely on what they put on it, but I don't have any independent recollection.

Q. With relation to the fifty-seven dollars and fifty cents charge for which you were paid forty-six dollars or eighty

percent thereof, do you claim that you should have been paid the entire fifty-seven dollars and fifty cents?

A. No.

Q. Do you claim that you should have been paid that amount before you were paid?

A. You are damn right, long before.

Q. Do you have any judgment as to when you submitted that claim?

A. It's on there, 1-25-83.

[108] Q. You have a note here that, in your handwriting 1-25-83, claim three hundred thirty-one dollars and sixty-nine cents, Ritch's.

A. For medicines, medications furnished to my wife. And a different amount submitted on the same day, those prescription medications.

MR. RUTLEDGE: Again Ritch's is?

A. Ritch's Pharmacy, Mountain Brook.

Q. And you have in your handwriting those two amounts, both for the period April 12 '81 to December 31, '82, would that be the period in which all of those pharmacy charges shown on this exhibit were received?

A. Must have been because it conforms with the dates that Blue Cross put on.

Q. Well, the latest date on the Blue Cross is November 20th, '82 I know, but see, this was through the period 12-31.

Q. In other words what you are saying is that there were no charges at Ritch's between November 20th and December 31st, '82?

A. Oh, yeah, but see, the form that they furnished me, take them to the pharmacist, he [109] gets the bookkeeper to fill it out and then he signs the whole list of it.

Q. Do you know whether, when those claims were submitted whether they were broken down between you and Mrs. Embry?

A. Yes, they sent one back because it wasn't broken down.

Q. So, insofar as any claims that are reflected by Exhibit 2-2 are concerned, your claim for damages is that you should have been paid in a more timely fashion?

A. Well, whatever my complaint complains of in that regard.

Q. It's not very particular?

A. Isn't required to be in the present system.

Q. I think I have to ask my client to find out what the facts are. You have three subcategories of claims, A, B, C in count one of your complaint?

A. We have did, too.

Q. D is for premiums, we'll get to that later. A says that you weren't paid, B says you [110] weren't paid the full amount and C says you weren't paid in a timely fashion. Can we agree that 2-2 relates only to subparagraph C?

A. I suppose so, looking at the allegations and looking at this one particular document.

Q. Any time you think you need additional documents that are available——

A. Oh, hell, I have been through those for years.

Q. I'll mark this number 2-3 now.

(Whereupon, Defendant's Exhibit 2-3 was marked for identification.)

A. Okay.

Q. And I'll ask you if you can categorize those claims as being, whether you suffered any damage as to result of any of the claims reflected on 2-3?

A. I couldn't answer that without reference to Blue Cross records because I didn't make a notation on this when I mailed it in.

Q. All right. You noted that you received a check on March 1st, 1983?

[111] A. Dated the 24th of February.

Q. All right. And that was in the amount of seventeen thousand fifteen dollars and seventy-three cents?

A. Right. It appears shortened three hundred eleven dollars and thirteen cents.

Q. Do you know how you derived the figure?

A. Not now I can't because this was—obviously I made these notes about the first or second day of March of '83.

Q. It appears that you were paying eighty percent of the amount of claims you submitted, does that coincide with your recollection?

A. It could be except I have got this figure down here, 3-11, three thirty-three that I added to the check, so——

Q. Do you know the basis of that figure?

MR. RUTLEDGE: Your Honor, if you don't know, you don't know. You are not required to sit there and try to figure it out.

A. Hell, that is a year and a half ago.

[112] Q. Do you have available to you any information, of any kind which would assist us in determining whether the information showed on Exhibit 2-3 represents a claim for damages that you are seeking in this case?

A. It would be in Blue Cross' file.

Q. Are you aware of why eighty percent of the claims are paid?

A. That is under major medical.

Q. Does that relate?

A. Accept they pay a hundred percent after a certain figure and I don't recall what the figure is.

Q. And that relates, among other things, to all pharmacy charges, is that right, they are covered under major medical?

A. I don't know if it's pharmacy or not, probably was. I can't tell, you see, because at that time I wasn't keeping copies of physicians' services. I now xerox them before I mailed them in.

(Whereupon, Defendant's Exhibits 2-4 through 2-8 were marked [113] for identification.)

Q. Now, on Exhibit 2-4, is this a copy of a letter you mailed?

A. January 25th, '83 written by my secretary in Montgomery, Mildred Gandy.

Q. And can you show me in this file what was enclosed with that letter?

A. That goes back to what ever documents were submitted on the first thing you referred to, which showed it was submitted on the 25th of '83. See, that coincides with the date on this copy of the letter to them, forwarded to them.

Q. So that would reflect that you at least dated the letter January 25th, 1983?

A. Well, that is why I said claimed at that date, see.

Q. You have—do you have any judgment as to what you consider to be a reasonable time for the processing of a completely accurate claim that you submitted to Blue Cross?

A. Well, I'll say this, some of these have not, none of these were inaccurate and I would consider that their own rule about the [114] seven days should apply, but even giving them two weeks, certainly three months is reasonable, in my judgment.

Q. Does your claim for delay encompass a claim for loss of use of the money?

A. Well, it also includes claims for interest from the damn money, from the date that was filed.

Q. Until when?

A. Until it's paid.

Q. You think there should be any period in there for processing the claim and mailing?

A. Seven or eight days, maybe two weeks even.

Q. Let me show you what is marked 2-5 which appears——

A. That is 2-5 are you looking at?

Q. Yes. This is a pharmacist claim form. Is that signed by you?

A. Yeah, that is for medicines furnished me.

Q. And that is dated January 25th, 83. Would it——

[115] A. That coincides so that must be a copy of the pharmacist claim made at that time, claim for pharmaceutical.

Q. And that is from Rusco Company in Montgomery, Alabama?

A. Yeah.

Q. And——

A. These all with the exception of one, coronary type medication and, well, decongestant, ulcer deals, Tagamet.

Q. And the date of purchase of the drugs that you submitted a claim for is shown as being——

A. Came from the pharmacy.

Q. And that would be May the 11th, '82 through August 18th, '82?

A. For Price Drugs.

Q. And 2-6, are those drugs from Price Drug Company for your wife?

A. Yeah.

Q. Submitted on January 25th, '83?

A. Yeah.

Q. And——

[116] A. Original was signed. I just made a notation to show the date. The original was signed by me as subscribed.

Q. And they show that these were for your wife?

A. Right.

Q. The purchases from April 6th, '82 to August 9th, 1982 in the total amount of fifty-seven fifty according to your records there?

A. Yes. Analgesics.

Q. And that was before your wife was diagnosed as having cancer, is that right?

A. Oh, yeah.

Q. And 2-7, '83?

A. Ritch's Pharmacy.

Q. That is for her in Mountain Brook?

A. For my wife, back stuff.

Q. And the date of the purchase ranged from May 7th, '82 to November 20, '82?

A. Right.

Q. And it was submitted on June 25, '83?

A. Thirty-one sixty-nine.

[117] Q. That is the total?

A. Right.

Q. If I can take you back to 2-5 and 2-6 on the notice verified by the pharmacist on June 12th, 1983, is that correct?

A. Well, what are you talking about 2-5?

Q. Exhibit 2-5.

A. Oh, excuse me. Apparently that is what appears. Mr. Boatwright, the pharmacist signed it and dated his signature as of the 12th of June, '83, I take it, and put the drug store tax identification number on it. That is Price Drug, Montgomery.

Q. Now, do you have any explanation as to why that date of June 12, '83 and subsequent date that you submitted on January 25th, 1983?

A. No, I don't. I didn't notice it. That ain't June, that is January, 12th of January on the front. Your eyes is as bad as mine. I caught you there.

Q. I asked you if you had an explanation, and you do.

A. It's January, it ain't June.

[118] A. Okay.

A. You are playing with me.

Q. If you can qualify me how much money you are claiming under any of these A's, B's and C's we can dispense with it.

A. You alerted me when you said June.

Q. I thought it was June.

A. When you asked for an explanation, there it is on the paper. Titch, titch.

Q. You are showing signs of impatience?

A. No.

Q. I'm going to tell you——

A. No, I'm restless.

Q. I understand.

A. I don't sit still this long. I'm usually passing in front of the jury.

Q. Wait a minute. You have been on the bench for ten years.

A. Well, I'm pacing behind the bench mentally.

Q. I want the record to review the comments by the counsel to reflect that you can not tell me, qualify in dollars the amount you [119] are claiming under the subparagraphs A, B and C.

MR. RUTLEDGE: That is inaccurate. If we had been requested in his interrogatories or in some request for production at this deposition to produce in the amount we claim or itemization of what we claimed, then the same would have been prepared. None of that has been done. The judge has been asked off the top of his head what these figures are. I'll tell Mr. Simpson now that if he would put such a question in appropriate form we will not only tell him, but chart it for him.

Q. Well, can you, do you want to phrase the question, I thought I asked him——

MR. RUTLEDGE: I don't think it is reasonable in a situation involving as many claims as this over a period of time such as this to ask the judge for a figure under compila-

tion. Go ahead with what you are doing. If you want to ask this in an interrogatory or some other format where we have a chance to compute it I'll be glad to do it for you. I'll take it back, I would, you know, be glad to do [120] it, I will do it.

A. All right. 2-8.

Q. Exhibit 2-8, Judge, after that, what I take to be as a no quicker better way available to us at the present time, in terms of what claims you are making?

A. Within a mathematical calculation, which I am not prepared to do.

Q. I am not so sure it's that easy.

A. Plus others.

Q. This is another form from Ritch's Pharmacy?

A. No, it's just a continuation.

Q. Two pages?

A. Two pages.

Q. And total five hundred seventeen dollars and ninety-five cents?

A. Right.

Q. Prescription drugs?

A. That is correct.

Q. Purchased?

A. Furnished to me.

Q. Purchased for you. Judge, that [121] covers a period from April 23rd, '82 through December 29th, '82 that you purchased those drugs.

A. Right. Do you want to know what some of them are?

Q. I count seventeen different varities of prescriptions.

A. I don't know how it's broken down.

Q. Do you know how many claims during this period from September '82 up through the filing of the complaint, how many claims you have filed?

A. No.

Q. On your behalf or your wife's behalf?

A. No.

Q. It is accurate to state that many of the claims such as the one we are looking at now had multiple drugs and procedures on one claim, did they not?

MR. RUTLEDGE: Object to the form.

A. Sure. Different ailments.

Q. Now, we come to a number of smaller size——

[122] A. Well, they are individual receipts.

Q. Individual receipts?

A. Or bills, copies of bills.

Q. And I'm going to number them.

(Whereupon, Defendant's Exhibits 2-9 through 2-15 were marked for identification.)

Q. I have put 2-9 through 2-15 on these. And, Judge, these——

A. What are they?

Q. You tell me what they are.

A. They are copies of third and fourth copies, of course, the third copy is submitted to Blue Cross, of statements that are returned with the medications from retired persons pharmacy, the old folks pharmacy, that medications are much, much less expensive there than they are elsewhere. So it represents a savings to Blue Cross.

Q. And those were purchased in St. Petersburg, Florida?

A. Well, that is where maybe you got the St. Petersburg. They are shipped by us or [123] mailed from St. Petersburg.

Q. You ordered them by mail?

A. The pharmacist served this area is a St. Petersburg, Florida type person.

Q. And you ordered these by mail?

A. Yes.

Q. Do you send in a prescription?

A. Yes. And the number of refills allowed, which the doctor marks on it and then they send you a copy of a form they have that shows you your next refilling, you are entitled to get it and how many you have left before you get a new prescription. It's a records keeping thing.

Q. And is the date that is shown in the right hand corner of each of these, would that have been the dates, the approximate date?

A. Probably the date they ship them. That is when they fill the order and put it in the process of shipping.

Q. And those run from August of '83 through December of '82?

A. If they are in order they appear to [124] be correct. If the earliest one is an August date and the latest one is December.

Q. All right. And were those submitted with your January 25th, 1983?

A. No, I would have to take the calculator and see if that is what went with this.

(Whereupon, Defendant's Exhibits 2-16 through 2-24 were marked for identification.)

Q. The next exhibit, 2-16 says see attached four hundred sixty-eight dollars and fifty-five cents?

A. I don't know, but I would venture to guess that if you added those that were prescription drugs on the forms you would find that it sums out to the figure on 2-16.

Q. And again you have dated that claim form 1-25-83, is that right?

A. Yeah.

Q. And here is another claim form?

A. Jesus. That is the claim they batted around for months, the thirty-two dollars for [125] x-rays.

Q. This, can you tell me why that batted around for months?

A. I don't know, because the doctor, what is the orthopedist, been around a long time over at Brookwood Professional.

MR. RUTLEDGE: Wise?

A. No, hell. John Higginbotham made those x-rays to do some study on that spine to see if there was anything he could do for her and he filed a claim and I didn't.

Q. Judge, look at 2-17.

A. All right. Thirty-two bucks.

Q. The second page of 2-17 it refers to the same claim, is that right?

A. Yeah.

Q. What you are saying is that Dr. Higginbotham submitted it and you submitted it?

A. I later submitted. That claim was paid, oh, six or eight months later.

Q. All right. Is the first page of 2-17 where you see thirty-two dollars see attached, that is not, is that when you——

[126] A. That is the second page, which was attached, but the original of it, this is a Xerox, as you can tell.

Q. The second page of it has some typed material and some things that are crossed out on it. For instance, apparently the original claim is submitted, had your name as John Embry, is that correct?

A. Yeah, that is filled out by the Brookwood Medical Center.

Q. And they submitted the claim in the name of John Embry, is that right?

A. I don't know whether that is right or not.

Q. Well, you received a copy of it from Dr. Higginbotham?

MR. RUTLEDGE: Counselor, how does he know that the John wasn't marked out and put in before somebody else sent it in?

A. I don't know.

Q. Weren't you told that the claim was submitted by Dr. Higginbotham's office with the name John on it?

[127] A. No, I wasn't told a damn thing.

Q. You don't know either way?

A. All I know is it wasn't paid until many months later. I'll admit it's a small item, but hell.

Q. It doesn't have the contract number filled in on the second page, which is exhibit 2-17, does it?

A. It's on the first page.

Q. The first page was submitted on January 25th, '83, wasn't it?

A. Yeah.

Q. This one was forwarded on August three, of '82 did not have the contract number?

A. Well, x-rays were made on the 23rd.

Q. Of '82?

A. Right.

Q. And it has a date forwarded?

A. I presume to the insurance company.

Q. It says signature of hospital representative, D. Reynolds, August 30, '82. And you finally got paid for that or did Higginbotham get paid for it or did both of you [128] get paid for it?

A. No.

Q. You don't know?

A. I paid Dr. Higginbotham in the interim and this was paid sometime in the spring of '83.

Q. It has on the second page of this, the complaint form has the date of August 30th, '82, the words written in your handwriting?

A. Yeah.

Q. Not accident?

A. Right.

Q. Now, do you know whether those were written in when it was originally submitted?

A. No. When they bounced it and kept asking for damn fool information about the accident. It's obvious from the form that it wasn't accident, low back pain with sciatica

and they have a history on it from the computer of years and years of back trouble nonrelated to any trauma, accident trauma of any nature.

Q. All right. Do you have any knowledge as to why that information was required in the [129] process of the claim whether or not it's an accident?

A. Sure.

Q. Why?

A. It would be a legal conclusion, but your own requirement, Blue Cross' own requirements, is all I know.

Q. I'm asking if you have any knowledge for the basis of that requirement?

A. No, not any real knowledge, just conclusions.

Q. Judge, it is clear that the words not accident are in your handwriting?

A. Sure.

Q. Is it not also clear that the word Eric is penned in as your printing?

A. I printed that in.

Q. That was after your submission of the original claim?

A. Oh, yeah, January 25th, '83 when I resubmitted.

Q. Are you claiming any damages in this suit, any portion of that?

[130] MR. RUTLEDGE: Hold up just a minute, please.

Q. Judge, I'm going to restart that question, Mr. Rutledge had to leave the room. Are you claiming any damages as a result of the delay in payment of that thirty-two dollars?

A. You damn right I am. Let's see the complaint. It

would be under one of these categories, A, B, C, D. A through C.

Q. All right. Well, can you—it's not failing to pay entirely, is it, we can eliminate A?

A. You can reach your own conclusions there. If it takes all, page nine of the complaint, till finally you can see that I got a check for thirty-two dollars, and whatever that interim period, you could include that if it—that it wasn't paid or you could include that it was a terrible long time before it was paid.

Q. Is there a distinction, and I don't want to jump ahead entirely, but is there a distinction in your mind insofar as the bad faith claim between a failure to pay and delay [131] in payment?

MR. RUTLEDGE: Your Honor, if you will wait just a minute. That is going to be a matter of law, and whatever distinction he draws in his own mind will be totally irrelevant.

A. That would be up to the law, the judges and you lawyers.

Q. Well, are you?

A. To argue that out——

Q. Are you claiming any punitive or exemplatory damages as the result?

A. Does the complaint say?

Q. In count two it does.

A. Then I am claiming.

Q. What I'm asking you, with respect to the claim of thirty-two dollars, is that shown on exhibit 2-17? The complaint isn't that specific, unfortunately.

A. It doesn't have to be.

Q. I understand that.

MR. RUTLEDGE: Although, we are not agreeing it isn't.

Q. Are you or aren't you recommending [132] exemplatory damages as a result of this claim?

MR. RUTLEDGE: We are where such are accessible by law where the facts develop exemplary damages are due based on the facts, then we are claiming those damages.

A. Very well answered.

Q. Do you have any other different answer?

A. No, he is my lawyer.

Q. I'm asking for facts. You are the one who is seeking money.

MR. RUTLEDGE: This ain't a fact. That is the matter of taking the facts and applying them to law.

A. Get to the bottom line.

Q. Do you say that is typical of all of these claims?

A. What is typical?

Q. This thirty-two dollar claim?

A. What do you mean by typical?

Q. Is it typical of your other claims?

MR. RUTLEDGE: You mean the delay parts?

[133] A. It's a typical type claim, yes, of other people and myself.

Q. What other people?

A. Members of this class.

Q. What knowledge do you have of those?

A. Nothing other than the pattern that has been shown to date by the conduct.

Q. What facts do you have upon which you base that answer of the conduct relating to other people, any?

A. I can only deduce.

MR. RUTLEDGE: You will have to exclude from your answer——

A. I know, what information you furnished.

MR. RUTLEDGE: That is correct.

A. But me personally, I could only deduce or conclude from the pattern of conduct exhibited in the instance of my late wife and myself claim, it's got to be a pattern, and from Mr. Thrasher's testimony.

Q. Those are the two sources?

A. Yes.

[134] Q. Have you talked to any other members of the class who has given you any information, I'll strike the word class and say any other state employee present or retired?

A. Yes.

Q. Who have you talked to?

A. Numerous ones have read about the lawsuit and read some of the details and said that is typical of the way I have been treated and that was in generalization, of course.

Q. Have you been interviewed by the press about this lawsuit?

A. No, I don't give interviews to the press, as a lawyer or judge or client. I don't believe in that. They can screw up anything.

Q. Even to the New York Times?

A. Mighty good client. I smile all the way to the bank despite all the abuse I took.

Q. Look at 2-18, Judge.

A. I'm looking.

Q. This is a claim summary generated by Blue Cross with a process date put on by Blue Cross of April 16, 1982 and it appears that in [135] this case you submitted——

A. I don't think this was something I submitted.

Q. No, this is generally about Blue Cross, and does it reflect that you have paid in full for—paid in full for the laboratory and x-ray charges that were made by Dr. Jane Day?

A. I think you will find that Dr. Jane Day in Montgomery, internship, managing me with Dr. John Stone at the time because we were staying in Montgomery, she very kindly, her office submitted these charges and I would get the check and I would pay her or I would have paid her already and then when she made the claim and they would send me the check. That is how I recall it.

Q. You have written on here in your handwriting Bedford?

A. That is for Bedford. She went to her, too. We lived in a little place right from our backyard to her backyard and I could go over there in my robe and slippers.

Q. In her house or her office?

[136] A. Her office is in a house there on Adams and we were on South Bain and they cornered each other across the lot.

Q. Let me ask you——

A. Her office hours was six a.m. till noon.

Q. May I ask this question?

A. Sure.

Q. Are there any charges related to your treatment by

or Mrs. Embry's treatment by Dr. Jane Day that weren't paid in full on a timely basis?

A. I don't—I can't, you know, my recollection ain't that good as far as the timely basis.

Q. This indicates that some laboratory work was done on April 6th, '82?

A. Yes, wait a minute. There were some charges for lab work that Dr. Day sent to another lab. She had a lab in her office with a few basics, but some of this blood work stuff, on either me or Bedford, I believe it was Bedford had to be sent to another place and that [137] got screwed up and we had to horse that thing around a while, as I recall. That wasn't this forty-two dollar check.

Q. Then, I'll ask you to look at Exhibit 2-19 and is it a photocopy of 2-18 with a check thank you received from Blue Cross?

A. Right.

Q. By April 16th, '82 had you taken to photographing the checks you received?

A. Occasionally, if I felt it was significant, and why I felt it was significant at that time, I don't remember.

Q. But does that indicate that for work which was performed by Dr. Day?

A. In her office.

Q. On April 6th, 1982 that you received a check dated April 16th?

A. Yeah.

Q. And that was in full amount of the laboratory charges, wasn't it?

A. I suppose so, if this adds up here, charges submitted, if that is forty-two dollars, then this is forty-two—no, wait a minute.

[138] Q. The medical care is for thirty-five dollars was applied against your doctor bill?

A. I don't know. I'm confused at this point.

Q. Do you have any judgment as to when you received that claim sent, that check sent to your Birmingham address dated April 16th, '82?

A. The date, the check is dated 4-16-82. If it had the usual delay en route it would have been received a week, ten days later in the mail.

Q. Did you have any—how many days at a time would you spend in Montgomery during that period of time?

A. In '82 usually about four, sometimes five, sometimes seven if we were going to have oral arguments, whatever.

Q. Did anybody pick up your mail at your home?

A. Yeah.

Q. Who would that be?

A. My—in '82?

Q. Yeah.

A. My daughter would do it and I had a [139] staff attorney, well, no, I had a law clerk, '82, it was picked up and put inside the house. Of course, the envelopes had post marks on them. I didn't keep the envelopes.

Q. But nobody deposited them to your account for you or endorsed them for you, did they?

A. No, I did that myself.

Q. Look at number 2-20, which is also Blue Cross claim summary with a process date of April 1, '82. The first item on it is for eighty dollars and sixty-one cents and there is a notation there, time limit exceeded for filing these services?

A. I guess that is when they threw that claim limitations thing. I have to assume that.

Q. Did you have any discussion with anyone there?

A. No, I gave up calling those people years ago.

Q. On those particular charges it indicated they covered services rendered from January 9, 1981 and February 6, 1981. Would [140] that comport with your recollection?

A. I don't have any independent recollection about it.

Q. Do you have any recollection of what those were?

A. Since physically they are in here adjacent to, unless this has been shuffled around, and I don't think it has, recovering of a back brace and putting another corset on, that is what they call the thing you lace made out of canvas or something at Smitherman's and for Bedford and at Durr Surgical Supply for me—no, that is blood pressure unit I got. The brace thing, as I recall, I don't know. One of these was one that had to do with—this was me, patient on 2-20, Exhibit Number 2-20. I was the patient, so these were charged and related to me. When was this, '81. This had to do with cardiac stuff.

Q. June, is it a fact that you did submit claims for either services or other medical items which were, where the services for which the charges were rendered were more than a [141] year old?

A. They took that position and, hell, I, you know, I got to the point I couldn't take all this time fussing with these people, I had my duties to perform.

Q. Well, is it your position that, and are you seeking in this suit any damages for medical charges rendered more than three hundred sixty-five days but before the filling of the claim?

A. Well, I can't answer that in that fashion because see,

some of these things had been incurred and some initial notice to them had been made, but the time limit thing on three hundred sixty-five days ran while we were jockying back and forth on it. And then this damn thing here.

Q. Referring to the second item?

A. Was absolutely inaccurate because I never submitted any claim. That is some of that gobbledygook about not related to the diagnosis and, hell, I had all kind of diagnosis listed by the doctor and every one of them related to [142] something that had been diagnosed.

Q. You are referring to the second item?

A. Yeah, four hundred fifty-six dollars and seventy-five cents.

Q. Let me get you to answer my question on the first item, and my question is this, now, listen to it, are you making a claim in this lawsuit for damages which you suffered for claims submitted to Blue Cross the first time more than three hundred sixty-five days after the service was rendered to you?

A. Not if at that time the provision relating to claims limitation that was in the contract because obviously that wouldn't be a valid claim. It would be the statute of limitation, contractual limitations. I can't claim anything illegally, I don't suppose.

Q. Well, the first part of Exhibit 2 is a book dated October 1st, 1980 which has that provision in it, which you showed me. Do you have any reason to believe that that was not a part of the contract?

A. No.

[143] Q. Do you have any knowledge as to the genesis of that provision in the contract?

A. Yeah. I have been told.

Q. What have you been told?

A. The claims like I described to Judge Almons for his wife whom died some years before, he didn't know he should have made a claim and he recovered several thousand dollars, I recall. And then that comes, I think the direct result of maybe his and other people's claims they put that limitation period in there.

Q. Who put it in there?

A. Blue Cross. That is where it is, in the Blue Cross thing.

Q. Is it your understanding that that is——

A. I didn't put it in there, that is for damn sure.

Q. Do you think the State Employees Insurance Board did?

A. That is a question of law as to who in the hell does those things under this setup you have.

[144] Q. Did you ever discuss that provision in the contract with any member of the State Employees Insurance Board?

A. No, I never discussed anything with them.

Q. Now, you wanted to talk about the second item on 2-20?

A. I don't want to talk about it, I just mentioned that.

Q. Well, you mentioned, then, that there was a deduction of fifty-seven dollars from the four hundred sixty-five dollars and seventy-five cent charge for services not related to the diagnosis, do you have any idea what that relates to?

A. No idea.

Q. Are you seeking——

A. I don't care.

Q. Recovery of that five dollars?

A. You can have the five dollars.

Q. Would you agree to strike that?

A. Strike the five dollars.

Q. Now, the other charges reflected on [145] 2-20 other than the first two seem to have been paid——

A. No here is one here.

Q. You are right, I'm sorry, the——

A. You have to look carefully.

Q. Right, Judge. The fourth item also reflected charges that were over three hundred sixty-five days?

A. Time limit extended for services, thirty-six dollars and five cents.

Q. Your answer to that would be the same?

A. Sure.

Q. Do you have any reason to believe that those charges were submitted any time before the three hundred sixty-five time limit expired?

A. No, I can't say that. I don't know what these particular ones on this 2-20 are.

MR. RUTLEDGE: Exhibit 2-20?

A. Exhibit 2-20. I just, my recollection fails me. I was the patient and it's a pretty substantial charge there. I would just have to guess as to whether they are [146] doctors or prescription medication, in all likelihood that is what it was.

Q. Other——

MR. RUTLEDGE: Once again, I want to state for the record that whether Judge Embry says that we are going to claim

those charges were in or out of the three hundred sixty-five days will depend on what the facts depicted shows.

MR. SIMPSON: Gene, that is what I'm asking, is his judgment and recollection, any information he has about the facts.

A. Do you mind if I stand? I'm getting stove up.

MR. RUTLEDGE: Well, Henry, what I mind doesn't matter, but what I am suggesting to you is that you are asking about a claim that he does not presently possess information when it arose or when it may have been filed and I'm telling you that I don't want you to proceed on the assumption that claim won't be made because if subsequent records show that based on the contract language they were due to be paid, then [147] claim will be made for them.

Q. Sure. Judge, let's get back to the factual matters. The other four items on Exhibit 2-20 were eighty percent of the amount submitted was paid?

A. Apparently so.

Q. Do you understand why only eighty percent was paid?

A. I think that is the deductible.

Q. Are you claiming any damages for the failure to pay a hundred percent of any of those claims?

A. Depends on whether, as Mr. Rutledge has stated, whether it turned out later that we find that these should have been paid under basic or the amount of the limits in dollars had been exceeded and therefore they were payable a hundred percent major medical?

A. That is the only way I can answer.

Q. But do you have any information currently available to you?

A. You got it.

Q. I would like for you to answer my [148] question.

A. I said I don't, you have it.

Q. That is what you haven't said, you don't have any information which would——

A. Presently, no.

Q. Which would assist us in determining whether or not this claim should be paid more than eighty percent?

MR. RUTLEDGE: As far as your question says currently available, and that includes our ability to procure Blue Cross' records, then I think that is what the judge is referring to.

A. That is right.

(Recess.)

Q. Judge, you have referred to 2-21, which is a back brace for Mrs. Embry in the total amount of——

A. That is to recover and put a new corset.

Q. Dated 12-22-81. Do you have any judgment as to when that was submitted to Blue Cross?

[149] A. No, not at this point and from independent recollection, no.

Q. Do you know whether or not you received payment for that?

A. At this time I can't tell.

Q. Would the checks related to Mrs. Embry's, Mrs. Embry as a patient, for instance, that back brace, would that check be payable to her?

A. No, it would be payable to the insured, me.

Q. Is that true in every case, you don't remember her ever getting a check?

A. No, I don't.

Q. Look at 2-22 which is, I don't know, two hundred thirteen dollars and forty-seven cent bill and do you have any recollection or can you tell me from reading that what that was for?

A. Yeah. I was, Dr. Day suggested I get a blood pressure outfit to monitor my own blood pressure and I got one of these electronic damn things in Montgomery and you could take it fifty [150] times back to back and get a different reading each time, so I had her calibrate it or check it against her mercury and she said that ain't worth a pinch, so I took it back. And this Mrs. Etheredge out there took the other one back and then I bought a regular cuff and a stethoscope, which I have at home now, and I taught my law clerk and secretary how to take blood pressure. It's not too reliable if you take it yourself.

Q. Well, then, what you have just described appears to amount to sixty-six dollars and twenty-eight cents?

A. I don't know how I came to those figures. That has got to be it, because this is the blood pressure unit, that is the dial and the cuff and this is the stethoscope and that is sales tax which is marked seven percent tax, sixty-six twenty-eight for two fourteen forty-seven was for that fool electronic thing that didn't work.

Q. Did you get full credit for that when you returned it?

A. We came out with a net figure, I [151] think what happened was I paid for the original, took it back, I know this is the way it happened, they gave me a refund after I had bought this one, they gave me a check that they drew out there at the place in Fairview Avenue.

Q. For one hundred forty seven dollars and nineteen cents?

A. Presumably that is correct because that is the differ-

ence in two fourteen forty-seven and two sixty-six forty-eight, if my figures were correct.

Q. Did you submit a claim to Blue Cross for that?

A. I don't recall it, but I'm sure I did.

Q. Do you know in what amount?

A. No, I don't.

Q. Do you know whether you were paid anything related to——

A. You will have to look through that file.

Q. You don't have any information?

A. Not independent recollection.

Q. Now, you have clipped together, [152] stapled together, let's do these separately because they'll be undone any way. Let's look at 2-23. Now, this is a claim summary, Blue Cross claim summary made May 25th, 1982.

A. Yeah, according to Blue Cross records.

Q. And your first charge is two hundred nineteen dollars and thirty-two cent charge?

A. Yeah.

Q. And there is deduction of sixty-five dollars and you were paid eighty percent of the difference?

A. I don't know.

Q. You don't have any idea what that charge is related to?

A. No. I think these documents to which are stapled might show it.

Q. You have written in your handwriting on here the name Mrs. Sheila Cooley?

A. That is the young lady up at the South 20th Street. Sheila something else and she went up and fool got married.

Q. Did she assist you, did you call her for information about this?

[153] A. At that time, as I testified earlier today, I would take these by and she would give me the claim form and put them all together and send them out to Riverchase.

Q. Are you claiming damages of any kind as a result of any conduct on the part of Mrs. Sheila Cooley?

A. Not Mrs. Cooley, no, sir.

Q. Did she handle everything efficiently?

A. Very effficient, very pleasant. When it goes out yonder, that is a different story.

Q. Look at number 2——

A. When it goes south.

Q. 2-24 and do you have any claim summary dated May 25th, '82, that you have any judgment?

A. No independent recollection what that is. These documents attached to it show that it's a major medical claim and somewhere behind it you will find something else.

(Whereupon, Defendant's Exhibits 2-25 through 2-30 were marked for identification.)

[154] Q. All right. Exhibits 2-25 through 2-30.

A. Yeah, yes, sir.

Q. Appear to be claim forms relating to 2-23 and 2-24, is that correct?

A. Appear to be, yeah.

Q. Now, is that your signature on——

A. Yeah, 2-25.

Q. Does it bear a date of May 20th, 1982?

A. It does that.

Q. Does that indicate when you submitted that claim?

A. Let's see, let me refer to the pharmacist thing to see what date. Sometime after the 2nd day of May because I—is all I can pinpoint and probably the 20th date with my signature indicates the date I mailed it in all liklihood.

Q. And that, the date, however, is in your handwriting, is it not?

A. 5-20.

Q. And in your handwriting here it says type of illness osteoporosis, et cetera?

[155] A. Wife.

Q. Total of this claim, two seventy-eight fifty-seven?

A. That is for Mrs. Embry.

Q. Now, then, there is a parenthesis, six hundred seventy-two dollars per both?

A. That is an aggregate probably of my claim and hers. There it is.

Q. 2-26 is a claim by you——

A. No, two seventy-eight, wasn't it, oh, you are talking about the number of the exhibit, excuse me.

Q. Exhibit 2-26 dated again May 20, '82 is a claim submitted by you for a total of four hundred twenty-three dollars and fifty-two cents, is that correct?

A. Is that for me?

Q. And then 2-27 is at Ritch's Pharmacy?

A. That is exhibit number?

Q. Yes, Exhibit Number 2-27.

A. Ritch's Pharmacy.

Q. And that is dated April 22, 1982, is that right?

[156] A. I presume that is 2-28, yeah.

Q. And it covers prescription drugs that you purchased there between the dates of January 9th, 1982 and March 31st, 1982?

A. Prescribed for me.

Q. However, the claim is originally submitted had your wife's name?

A. No, no, it wasn't submitted. This was xerox of the form that I at convenience used to—see, I got them juxtaposed so before I mailed them I struck mine in pen and put the proper name on it because it's different.

Q. Is it your recollection that you did that before it was submitted?

A. Oh, yeah. I know damn well I did.

Q. Or after?

A. I know I did it before.

Q. Exhibits 2-23 through 2-30 all, were they all sent on May 20th?

A. May 20th in all liklihood, I have them all stapled together. Must be for that reason, they are all related, filed simultaneously. That is another pharmacy on [157] 2-30. That is another pharmacy, for Price Drugs.

Q. And the pharmacist signed it May the 2nd?

A. Yeah.

Q. '82, 1982. From looking at Exhibits 2-23 through 2-30, are you claiming any damages, can you give me any information to indicate whether or not you are claiming any damages for failure to pay any portion of that claim?

A. Depends on what develops as to what the records show how soon I got my money, if I have got it under one of these three categories on page nine of the complaint, A, B and C.

Q. Let me digress and ask you, is there any one particular claim that you can tell me about that you know you didn't get paid?

A. That I know I didn't get paid?

Q. Yes.

A. The one that related to the—the one I can think of at the moment is that, the, oh, we referred to it back yonder, I don't know which one it was, we referred to it earlier in the testimony.

[158] Q. Dr. Higginbotham?

A. That was one, but, no, we were talking about another one. We've talked about so many things that relate today, I'm tired—it's getting late in the day, I'm tired.

MR. SOMERVILLE: Was it one of your wife's claims?

A. Here is a letter I find.

Q. Let's mark that as——

MR. RUTLEDGE: Do you include in your question current unpaid claims, Henry?

MR. SIMPSON: Yes.

A. There are some of those that haven't been paid. They are over a month old now.

Q. And that is what you are going to bring us information on in the morning.

A. I'll have copies of them.

Q. Looking, Exhibit 2-30 is a letter from you dated April 27th, '82 sent to Blue Cross, is that correct?

A. Yeah.

Q. And it refers?

A. Here is what it refers to. Let me [159] read that letter, if you would.

Q. Sure, Judge.

A. I'll have to take back an answer about Mrs. Cooley's negligence. I notice here that she put hypertension on the wife's claim form. That is my ailment. My wife had low blood pressure. Okay. Shoot.

(Whereupon, Defendant's Exhibits 2-31 through 2-45 were marked for identification.)

Q. Does your letter of 2-30, your letter April 7, 1982, which is marked Exhibit 2-30, did that enclose Exhibit 2-31?

A. This, they bounced back to me. That is not my handwriting. No, this is the one that Mrs. Cooley, see, she had put on Bedford's claim form, she volunteered that she would fill it out for me. She put hypertension, back and neck injury, hypertension. Well, hypertension wasn't applicable to my wife and she hadn't put anything about an accident on there. I added that after they bounced it back. And then I sent back to them on their letter of 3-22-82, [160] them being, it being Blue Cross, 2-32, patient name Embry, contract number, so and so, claim number. We are unable to process your claim. Please give date of accident, indicate if drugs were prescribed for accident, thank you. Then I wrote in when I sent it back, these are the same medications base, which followed back surgery from non-accident related herniated lumbar disk and attempted vertebra fusion, lack of which occurred—the last of which occurred 10-28-71. That is the date I couldn't recall. Medications for reimbursement for which you have paid, I didn't complete that sentence.

Q. You think——

A. I meant to say have paid in the past, for past medications, not the ones represented on that claim.

Q. Are 2-31 and 2-32——

A. All part of something I stapled together.

Q. And did they accompany your letter as exhibit 2-30?

A. Yeah, I sent them back corrected.

[161] Q. Does 2-31 bear at the bottom your signature?

A. Yeah.

Q. Did you sign it?

A. I had signed it in blank.

Q. Did you date it March the 9th, 1982?

A. No, you can tell that ain't mine. This is, all this other handwriting is Mrs. Cooley's, except heavy dark black ink which I corrected Mrs. Cooley's errors when they sent this back to me and sent it back to them with the corrections and with the notation on the bottom of the bounce back letter.

Q. Okay.

A. But the signature on 2-31, the bottom, even though it's in the light ink, is your signature, is it not?

A. Which I place—my signature which I placed on a blank form that I left at 20th Street.

Q. What form did you give to Mrs. Cooley to fill out that form?

A. Mrs. Cooley had the information.

[162] Q. What was it, was it bills or do you know?

A. Oh, it was what shows here as—I didn't keep a copy of the original was submitted by her, yeah. These were for drugs for myself and Mrs. Embry as their letter indicates.

Q. But the form is originally submitted to the Blue Cross claim center, had your wife's name as the patient?

A. No, no. The form that was left with Mrs. Cooley had my signature on it.

Q. And that is all?

A. That is right, and she, as I mention in the letter——

Q. But the form——

A. Very courteously offered to handle this for me.

Q. Were you in a hurry or do you recall anything else about that?

A. Yeah, I recall getting paid.

Q. Do you recall any——

A. I recall what I thought, if you would like to know that.

[163] Q. What did you think?

A. Just one more screw-up.

Q. Do you recall anything more about your meeting with Mrs. Cooley in which you signed a blank form?

A. I just asked her how was she getting along, how was married life.

Q. Do you recall her answer?

A. Said it's fine, but her father has a heart condition, he was a Birmingham Police officer and she took an interest in me because she couldn't get her father to behave himself. I smoke. I hadn't smoked at that time in about four years, since October of '78, no, December '78 and we had a little pleasant colloquy there, dialogue, whatever you want to call it.

Q. Anything else you remember about it?

A. No, she is a pretty girl, I remember that, very handsome girl.

Q. Any little other discussion about the substance of your claim that you remember?

A. I said, I think that I recall I said something like here are some more drugs, [164] periodic drugs for Mrs. Embry and myself, she said I'll take care of it, we got all the information and I left it. I was on my way to the office over at UAB.

Q. And what she filled in the form, the information you gave her had patient's name Bedford and type of illness, back and neck injury, hypertension, is that correct?

A. That is what she put on it.

Q. And then in the heavy black ink is what you wrote in?

A. After I got it back from Blue Cross and resubmitted it.

Q. And in response to referring that back you wrote your letter of April 7, '82 in which you threatened to sue, is that correct?

A. I certainly did.

Q. Is this, we've talked about the time in '68 that you threatened to sue, approximately '68?

A. Well, no, I don't think I threatened to sue. I didn't testify to that effect.

Q. That is——

[165] A. Are you talking about with the conflict with Miller?

A. Yes.

A. No, I didn't threaten to sue. I said it's a hell of a note, and it was a hell of a note.

Q. Is this April 7, '82 then the first time you threatened to sue Blue Cross?

A. Yes. I was getting a little tired of it, if you want to know the truth of it. As you can see, I didn't do anything.

Q. You mentioned the——

A. You see.

Q. Tortious bad faith?

A. I'm a bit irritated and I wish to inform you that unless the claims are paid I tortious bad faith and act accordingly, and I meant it and I have done it.

Q. And did you receive any response to that letter marked 2-33?

A. From Mr. Oglesby, yeah. I got that letter, yeah, I got it.

Q. Did Mr. Oglesby at that time tell you [166] that a portion of the claim which you had submitted was barred by the contractual provision that was more than three hundred sixty-five days?

A. That is what he said. Whether it was lying or not, I don't know.

Q. Just don't have any information?

A. No.

Q. Did he explain to you why he needed the information?

A. Well, the letter speaks for itself.

Q. From that time forward did you understand why it was necessary to know whether it was caused by an accident or not?

A. I just have—all I know is what he stated. I don't know what the truth is.

Q. Did he tell you that if you would file your claims as they occurred that your, that would help alleviate your complaint about holding the money?

A. Yeah, I guess that is what is in the letter.

Q. Is there anything in the letter [167] that——

A. File a claim for twenty-five, thirty, thirty-five dollars claim as they occur, I got better things to do than file individual claims every time I incur an expense, hell.

Q. Was there anything in that, was there any follow-up communication between you and Blue Cross about the subject matter of that particular——

A. Not until, what date did you file this lawsuit?

MR. RUTLEDGE: January of '84.

A. January of '84 there wasn't any follow-up.

Q. Well, let me ask you this, as far as you know was there any written correspondence between you and Blue Cross other than the submission of claims and the claim summaries which you received?

A. If there was it's in here.

Q. Do you recall?

A. I don't know. I haven't looked through that thing in recent months.

[168] Q. Did Exhibit 2-33, the letter enclose Exhibits 2-34 and 2-35?

A. Yeah, except copies that I made.

Q. And you did not dispute them any further at that time the amounts paid?

A. Well.

Q. As shown on 2-34 and 2-35, did you?

A. No.

Q. 2-26 is a letter to you dated March 19th, 1981?

A. Yeah.

Q. From Mrs. Holliness of Blue Cross?

A. I didn't know the Pope was married.

Q. In which she sent you copies of your major medical claims for the year '79, '80 and '81 through that date?

A. Yeah, secretary to E. Gene Chrysler, I don't know.

Q. Do you know what?

A. I don't know why they sent me this. I don't recall asking for major medical claims for '79, '80 and '81.

Q. Did you receive it with that letter?

[169] A. I don't know. If they are in here I got them.

Q. Do you have any recollection of asking for the claims?

A. No, I don't.

Q. Was there some other type of coverage or——

A. No.

Q. Plan available to you for which you could recover?

A. No. See, this is in '81 to date, see, that was in 1981, so that was back in—that was back and cardiac, respectively. I don't know.

Q. You don't have any judgment?

A. I don't know why that came up because that predates my letter of April 7, '82.

Q. Just taking them as I come to them.

A. I don't assume responsibility of whether these are in chronological order or in the——

A. I had them as in the file.

Q. Is 2-37 simply a xerox copy?

[170] A. Of that card.

Q. We find in here a card from Mr. Rutledge. Was he——

A. He wasn't soliciting my business.

Q. Just calling on you?

A. No, I called him.

MR. SIMPSON: Gene, do you want to remove that?

MR. RUTLEDGE: I don't know what it is. I stuck that on there to get the file.

Q. Exhibit 2-38?

A. Yeah.

Q. Is a claim summary?

A. Yeah.

Q. With the date at the top of December 1st, 1983?

A. What it appears to be.

Q. Do you know what that is?

A. Blue Cross-Blue Shield form, says claim summary and it's got a whole list of stuff and no payment except a hundred dollars for Bedford's outpatient x-ray, therapeutic x-ray. By this time, which had exceeded the, whatever [171] those limits are on dollars, so it paid a hundred percent.

Q. All right. There are six entrees on that?

A. Yeah, this is that deal where the claims for therapeutic x-rays injuries, that is when the group—the group out there threatened to sue me. I finally got these claimed then and this is what they put on it. Charges previously considered. It wasn't previously considered filed by me.

Q. You got this back? Did you get it back shortly after December 1st, 1983?

MR. RUTLEDGE: This being exhibit——

Q. 2-38.

A. That thing came in before Christmas because I was out of town on Christmas. That came in somewhere around the 15th.

Q. Of December, 1983?

A. In '83 Christmas was on a Wednesday and I left the City of Birmingham on the preceding Thursday afternoon.

Q. These are all, these being exhibits [172] 2-38 through 2-42, all have a date of December 1st, 198—I'm sorry.

A. That is that therapeutic x-ray.

Q. 2-38 through 2-41 have the date of December 1st, 1983?

A. You don't have a 2-42.

Q. It's dated December 17th?

A. Oh, that is previous. This is me, I think. No, that is Dr. William Howley and this was for September, see, this was last—the 15th of September she had gone to Dr. Howley's office for blood study and found the white blood count of zero, so he put her back in the hospital after the chemotherapy and that is when she died, the 20th.

Q. Do you have any judgment when these claims are reflected on Exhibit 2-38 through 2-41 were submitted?

MR. RUTLEDGE: May I just see those just a second?

Q. Do you remember the question?

A. No. When were they submitted, I think is what you asked me.

[173] Q. Yes.

A. At this time I can't tell when they were originally submitted because there were several submissions by different people, myself and the outpatient x-rays therapeudic group. And as I mentioned earlier today about their threatened suit because my account was way past due. It was a long story and you will have to get it question by question because I can't narrate it.

Q. Did you ever submit a claim for the same charges that are reflected on Exhibits 2- ——

A. Not until——

Q. 2-38 through 2-41?

A. —until I submitted and this was the response. I told you about it.

Q. This, in other words, is it your testimony that 2-38, the claim summary is Exhibit 2-38 was in response to a claim that you filed?

A. Ultimately I filed it myself.

Q. Do you have a copy of that claim?

[174] A. No, unfortunately back in those days I wasn't xeroxing the claims. Yeah, wait a minute, here is one but that is not the—that is for Dr. Howley's services there, so that is not, that is not the claim related to the therapeutic x-ray. Is that that stuff from the therapeutic x-ray forks, past due bills, yeah. When does that show. They billed me on the 18th day of August. That is one billing. Of course, they had these forms, you rip them apart. Some pink looking ones came later about the past due and all that crap. I should have said hell, go on and sue.

Q. That is what James A. Simpson told you to do in '68?

A. That is good advice I didn't follow.

Q. I'm going to mark what you have just referred to as 2-43 and 2-44?

A. We'll run out of numbers before long.

Q. And these show a bill addressed to you for services rendered to Mrs. Embry at Baptist Medical Center?

A. That is right. Of 7-7-83 notation to [175] date your insurance company has not paid on your account and that x-ray therapy had been going on since March.

Q. They sent that to you in August of '83 and a duplicate bill in September of '83?

A. Exactly. And then the pink ones came.

Q. Except as was——

A. After she was dead.

Q. Now, are those—does the two thousand two hundred fifty-nine dollars shown on 2-43——

A. Is that all of it?

Q. Does it include any of the charges that are reflected in Exhibits 2-38 through 2-41?

A. I can't tell because these statements were summary type statements, I call them, these statements from Baptist Medical Center for therapeutic x-ray, you see those that I find——what is this?

Q. That was an envelope so you could send your check back if you wanted to.

A. Oh, yeah. I don't know because this thing has gotten in a tight situation as far as [176] them wanting their money and Blue Cross had not paid them and——

Q. Well, is it your recollection that all or a portion of the bill reflected on 2-43 was for x-ray treatment?

A. Oh, it was, no question about that. I'm trying to get the first date that—well, the first date shown on Blue Cross' claim summary sent me, summary sent me.

MR. RUTLEDGE: Give the Exhibit Number.

A. 2-38. Shows—that form shows the June the 6th and you have to, our records indicate this charge was previously considered. It wasn't a charge that I had submitted a claim for. Apparently it was a charge that x-ray therapeutic baptist Medical Center had submitted and had not been made.

Q. Did you ever receive any type of explanation from anybody as to why that had not been paid?

A. Hell, no.

Q. Did you ask Baptist Medical Center [177] Montclair?

A. I sent them a little handwritten note because I don't have a secretary in Birmingham and asked them please fill out those forms and that is when I filed and that is when I got this response, these charges have previously been considered. If this is not a duplicate charge contact our customer service center. I never could get them to answer the phone out there. I tried time and again to call that number, it keeps ringing, ringing, ringing or it's busy.

Q. Did you ever talk to anyone verbally at Baptist Montclair about that?

A. No.

Q. And did you ever receive any written——

A. Wait a minute. I mentioned this to the Dr. Dick because on some occasions I would take Bedford out there and wait on her because often times he would do her at 5:00 when everybody else was gone and his head nurse, a loving woman, I can't remember her name, would stay there and I would take her home. On other occasions the housekeeper would take her and [178] wait while I had to work.

Q. Now, Judge, Exhibit 2-38 through 2-42——

A. Yeah.

Q. Were in your file attached to an envelope.

A. Well, I don't know whether they were attached to it, but there was an envelope there with them, and you see——

Q. The envelope is dated, has a post mark of December 7th, 1983?

A. Right.

Q. And let's mark the envelope as Exhibit 2-45. Did you ever write Mr. Rutledge on that date?

A. No, I just put them in this envelope and mailed them.

Q. So you just put these exhibits in the envelope?

A. Posted them to him.

Q. There is the post mark of December 7?

A. '83.

Q. And you didn't send him any [179] instructions with that?

A. No. He is a lawyer.

Q. Had you already employed Mr. Rutledge at that time?

MR. RUTLEDGE: Don't answer that question.

A. No.

MR. RUTLEDGE: Why do you want to know about our conversation? I didn't ask you about your conversations with your client.

MR. SIMPSON: I haven't filed a class action suit, either.

MR. RUTLEDGE: That doesn't entitle you to go into our conversation and relationship.

A. What Gene and I said to each other is not relevant to your complaint.

Q. Is that your personal judgment?

A. Personal.

MR. RUTLEDGE: Ask your next question and let me tell you that we are not going to answer questions which had to do with my relationship with my client, and I ask you as a matter of courtesy not to make those inquiries [180]

because I don't do it to you. How would you like it if I got Mr. Thrasher and said what did Mr. Simpson say to you before you took this deposition. I would resent that and out of courtesy to you I wouldn't ask it.

MR. SIMPSON: This is entirely different.

MR. RUTLEDGE: Name me one thing, one case or one authority that has to do with class action that gives you have the right to inquire into my relationship with my client.

MR. SOMERVILLE: Gene, there are cases.

MR. RUTLEDGE: Just name one, Bill. You and I have handled these things for years.

MR. SOMERVILLE: There are cases that say that the plaintiff's knowledge of participation in and the circumstances of a case, how he keeps up with it, what he does, what he knew about it before it was filed, all that is pertinent.

MR. RUTLEDGE: And you think this is necessary for—entitled him to know when he [181] retained me as an attorney? I instruct him not to answer the question.

A. And I shant.

Q. I will insist on an answer, but I will go on to another one in view of the witnesses reluctance.

A. Not reluctance. I'm just not going to answer it.

Q. Exhibit 2-45, does that refresh your recollection?

A. About what?

Q. About referring these claim summaries dated December 1st, 1983 on or before December 7th, 1983?

A. Sure, I must have gotten them before or I couldn't have mailed them to Gene on the 7th.

Q. I am not trying to trick you. You previously testified that you thought you have received them after Christmas?

A. No, I said before Christmas. You were talking about something earlier today.

MR. RUTLEDGE: He testified he got [182] them before Christmas because he wasn't in town Christmas.

A. I left Thursday before Christmas on Wednesday, whatever the dates were.

Q. I was asking you whether or not you had ever had any connversations with anybody at Baptist Montclair about it and you were telling me that you had?

A. I possibly mentioned it.

Q. To Dr. Dick?

A. About these bills, but, of course, well, I don't know anything about that. That is handled with some bookkeeping type folks. The doctors won't ever acknowledge they know anything about their charges except they want their damn money fast.

Q. What you are testifying to is that Dr. Dick's——

A. A paraphrase. I don't remember the exact words. The fellow has a Scottish brogue, but he is good.

Q. Is there anything else you can recall about your conversation with Dr. Dick about the [183] billing?

A. No, I mentioned that I understood they showed my account as being delinquent, past due and he said well, they filed those, they meaning bookkeeping end of his department, Baptist Medical, they file those claims, don't you worry about it. Well, hell, I didn't worry about it until that same group, the other arm, as it were, threatened to sue me and the notation, your insurance company has not paid. I don't know.

Q. Do you recall whether you have the subsequent statements after Exhibits 2-43 and 44?

A. If I had them they would be, I think pretty damn sure they were sent to Blue Cross as substantiating, what do you call it, supporting documents to the claim because those showed the dates that the——

MR. RUTLEDGE: Have those claims ever been paid?

A. I can't answer that directly, Gene, because I told you right after the lunch break how this all occurred.

[184] MR. RUTLEDGE: But I know—do you know whether or not they have ever been paid to date?

A. Yes.

MR. SOMERVILLE: What claims?

MR. RUTLEDGE: The ones on 2-38 through 2-41.

A. From time to time there were some more.

Q. Well, you have answered Mr. Rutledge that you do know whether they were or not?

A. Yeah.

Q. Were they?

A. Well, in a rather bazaar fashion.

Q. Can you tell me about that, please?

A. Yeah. When I filed this claim, these claims as a result of what were detailed about the therapeutic x-rays.

MR. RUTLEDGE: Give the exhibit number.

A. The statement that he has referred to on 2-43, 2-44 for the twenty-two hundred and fifty-nine dollars, let me try to [185] chronologically—when I kept getting these bills and I was assured don't worry about it, the claim has been filed by the group with Blue Cross, and yet I continued to get these bills, my best recollection is I sent these people checks, not for the twenty-two fifty-nine in total. I paid them over a period of sixty days. Meantime I got them to

complete the claim form and attached those itemized dates of therapy, x-ray therapy and put them with it and sent it to Blue Cross. Then I got this back and then later I started getting refund checks.

Q. By this you mean 2-38?

A. 2-38 through 2-42. Then I started getting refund checks in increments from the radiological group, much later. Now, what interpretation given, I don't know.

Q. Do you have—could you find your canceled checks for November or December or January?

MR. RUTLEDGE: If you will make an appropriate——

MR. SIMPSON: We have asked for that [186] in the notice of the deposition.

MR. RUTLEDGE: Let's see, which one do you have in mind?

MR. SIMPSON: Number one.

A. What does it say?

MR. RUTLEDGE: Any and all documents relating in any way to correspondence between the named plaintiff or his counsel.

MR. SIMPSON: I'm sorry, Gene, number four?

A. What does four say?

MR. RUTLEDGE: All medical records, reports, bills or other medical documents that relate in any way to the plaintiff or his wife, how would that include a check?

A. It doesn't.

Q. Well, do you have those? You would have, I think you said earlier you did have the canceled checks?

A. I have canceled checks.

Q. Well, can you give me your recollection? I'll make a request through counsel?

[187] A. I'm testifying from recollection, Simpson. I don't have a photographic memory.

Q. As to when you paid Baptist Montclair all or a portion of the amount represented?

A. I don't know. As I stated earlier, as I recall——

MR. RUTLEDGE: Let me state for the record that we'll attempt to identify and make available to counsel, Blue Cross the canceled checks and however——

A. I got boxes full of checks.

MR. RUTLEDGE: However, will require us to, I suppose sit down with Judge Embry and go through a number of checks. You haven't isolated them, have you, Judge?

A. No, hell, no.

MR. RUTLEDGE: But I do want to say that it's rather clear that whatever dates claims were filed with Blue Cross, when Blue Cross sent the checks is clearly within Blue Cross' knowledge, but as an effort to accomodate counsel we'll try to find those.

A. I'll bring them down here and y'all [188] sift through them.

Q. I don't want to belabor it but obviously a check from him to Baptist Montclair is not in our records.

MR. RUTLEDGE: In your records will be the dates that the claims were filed by those folks at Baptist Montclair, will be the dates that Justice Embry filed his claim on those items and also you will have the records of the date you sent the checks out to Baptist Montclair.

Q. Okay. Judge——

A. I'm handicapped because I don't have a secretary here and that is the reason you don't find copies of correspondence. These handwritten letters, I have been practicing law, I used to send things with cover letters, have a

record of it, but unfortunately I can't handle it that way without taking an undue amount of time.

Q. Well, Judge, what is your recollection?

A. What I have stated.

[189] Q. About——

A. I——

Q. Listen to my question.

A. Okay.

Q. What is your recollection about the date that you first received checks from Baptist Montclair as reimbursement for a check you paid them?

A. I have no idea.

Q. Do you recall how many checks you received from Baptist Montclair?

A. No. If there is a record of it——

MR. RUUTLEDGE: Judge, just a minute.

(Recess.)

Q. Judge, your counsel has called a recess to talk to you in the hall and comes back and says he thinks you may be able to help us. Can you help us?

A. I sure can.

MR. RUTLEDGE: Wait a minute, no. Counsel took Judge Embry out about two minutes in order to refresh his recollection on a matter that we hope will be of some benefit to Mr. [190] Simpson.

MR. SIMPSON: Thank you, Gene, I'm just recalling your outburst during Mr. Thrasher's deposition.

MR. RUTLEDGE: An unreciprocated courtesy.

MR. SIMPSON: I remember the statements in the record in Mr. Thrasher's deposition.

A. Do you want to repeat the question?

Q. I'll repeat the question.

A. As I recall the question was when did I refer the payments—that I received, you asked me when did I receive the reimbursement or refund from radiological group.

Q. I didn't say radiological group because this bill——

A. It says Baptist Montclair but that is what it was for, the 2-43. I got it, I started getting those from Baptist Montclair after this lawsuit was filed.

Q. So it would have been sometime after January of '84?

[191] A. Yeah, as I recall it was in the spring.

Q. Of '84?

A. Yeah, but I have some records.

Q. You do?

A. Yes.

Q. Could you bring those in the morning?

A. I'll bring them, but it's deposit slips and canceled checks.

Q. I was wondering if you might have a bottom part of the check, a voucher?

A. No, I don't keep those, but normally, except if it's twenty dollars or something, my procedure is to deposit these and show on the deposit slip income.

Q. Now, trying to wind up the controversy about Exhibit 2-43 and 2-44, are the amounts represented by those bills, did you receive eventually from Baptist Monclair the entire amount?

A. I don't know. They came in in increments so I deposited them.

Q. Well, do you have any knowledge of [192] when Baptist Montclair was paid by Blue Cross?

A. No, except what I deduced.

Q. Do you have any information as to when Baptist Montclair originally submitted claim to Blue Cross?

A. No idea. The only thing I can tell is on Exhibit 2-43 dated statement 8-18 statement date. Discharge date of the patient Bedford, 6-6-83 to date your insurance company has not paid on your account.

Q. And the follow-up on these exhibits, is it your judgment you submitted your claim to Blue Cross for these same charges shortly before December 1st, 1983?

A. Yeah. That Exhibit 2-38 through 2-42, no, 2-41 was the response I got from them that this has previously been considered, but no claim of mine had been previously considered, so it must have been what you call it, Baptist Montclair.

Q. It says this claim was previously considered, doesn't it?

A. Yeah.

[193] Q. Now, on the 2-42 is a claim summary that bears date November 17th, 1983 and apparently is unrelated to any type of extra controversy?

A. Dr. Howley's in-patient medical care. That was chemotherapy and his office lab stuff for having to do with blood count, this was the only occasion. Readmission in the hospital, which resulted in her death.

Q. And those were paid in due course and the percentages and amounts that were due?

A. I suppose.

MR. RUTLEDGE: But you don't know that, do you?

A. No, I don't know.

Q. But you have no information to the contrary, do you?

A. No.

Q. Do you want to stop, Judge?

A. I would like to.

MR. SIMPSON: Let's come back in the morning.

FURTHER DEPONENT SAITH NOT

[194] CERTIFICATE

STATE OF ALABAMA)

JEFFERSON COUNTY)

I hereby certify that the above and foregoing deposition was taken down by me in stenotypy, and the questions and answers thereto were reduced to typewriting under my supervision, and that the foregoing represents a true and correct transcript of the deposition given by said witness upon said hearing.

I further certify that I am neither of counsel nor of kin to the parties to the action, nor am I in any wise interested in the result of said cause.

/s/ KATHIE THAMES
Commissioner—Notary Public

Exhibit Five

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

ADDITIONAL SUPERSEDEAS BOND

WE the undersigned principal and surety, hereby bind ourselves to Margaret Lavoie and Roger J. Lavoie, Sr. in the amount of ONE MILLION SEVEN HUNDRED SIX THOUSAND EIGHT HUNDRED FORTY-EIGHT and 17/100 ($1,706,848.17) DOLLARS, for the payments of which we bind ourselves and each other, our heirs, executors, and administrators, jointly and severally, and as part of this undertaking we hereby waive our rights of exemption as to personal property under the Constitution and Laws of the State of Alabama.

WHEREAS, the above named Appellees, Margaret W. Lavoie and Roger J. Lavoie, Sr., recover a judgment against Appellants for the sum of ONE MILLION SEVEN HUNDRED SIX THOUSAND EIGHT HUNDRED FORTY-EIGHT and 17/100 ($1,706,848.17) DOLLARS.

Now, therefore, the condition of the foregoing obligation is such that, if the Appelant shall prosecute this appeal to effect and satisfy such judgment, penalties, costs, including costs of appeal as may be rendered in this case, then the said obligation to be null and void, otherwise to remain in full force and effect.

Executed with our seals this 8th day of March, 1985.

AETNA LIFE INSURANCE COMPANY
a Corporation

By: /s/ WILLIAM M. CUNNINGHAM, JR.

William M. Cunningham, Jr.
Its attorney
3763 Professional Parkway
Mobile, AL 36609

THE AETNA CASUALTY & SURETY COMPANY

/s/ D. E. LUDLOW
D. E. Ludlow
Attorney in Fact

AETNA [logo] LIFE & CASUALTY
THE AETNA CASUALTY AND SURETY COMPANY

Hartford, Connecticut 06115

POWER OF ATTORNEY AND CERTIFICATE OF AUTHORITY OF ATTORNEY(S)-IN-FACT

KNOW ALL MEN BY THESE PRESENTS, THAT THE AETNA CASUALTY AND SURETY COMPANY, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint D. E. Ludlow, Nelda Loper or Betty Lane—of Mobile, Alabama, its true and lawful Attorney(s)-In-Fact, with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or, if the following line be filled in, within the area there designated , the following Instrument(s): by his/her sole signature and act, any and all bonds, recognizances, contracts of Indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any and all consents incidents thereto

and to bind THE AETNA CASUALTY AND SURETY COMPANY, thereby as fully and to the same extent as if the same were signed by the duly authorized officers of THE AETNA CASUALTY AND SURETY COMPANY, and all the acts of said Attorney(s)-In-Fact, pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following Standing Resolutions of said Company which Resolutions are now in full force and effect:

VOTED: That each of the following officers: Chairman, Vice Chairman, President, Any Executive Vice President, Any Senior Vice President, Any Vice President, Any Assistant Vice President, Any Secretary, Any Assistant Secretary, may from time to time appoint Resident Vice Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of Indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

VOTED: That any bond, recognizance, contract of Indemnity, or writing obligatory in the nature of a bond, recognizances, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the Chairman, the Vice Chairman, the President, an Executive Vice President, a Senior Vice President, a Vice President, an Assistant Vice President or by a Resident Vice President, pursuant to the power prescribed in the certificate of authority of such Resident Vice President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

This Power of Attorney and Certificate of Authority is signed and sealed by facsimile under and by authority of the following Standing Resolution voted by the Board of Directors of THE AETNA CASUALTY AND SURETY

COMPANY which Resolution is now in full force and effect:

VOTED: That the signature of each of the following officers: Chairman, Vice Chairman, President, Any Executive Vice President, Any Senior Vice President, Any Vice President, Any Assistant Vice President, Any Secretary, Any Assistant Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or underwriting to which it is attached.

IN WITNESS WHEREOF, THE AETNA CASUALTY AND SURETY COMPANY has caused this instrument to be signed by its Assistant Vice President, and its corporate seal to be hereto affixed this 16th day of July, 1981

THE AETNA CASUALTY AND SURETY COMPANY

[AETNA SEAL]

By /s/ R. T. RIPPE

Assistant Vice President

State of Connecticut)
) ss. Hartford
County of Hartford)

On this 16th day of July, 1981, before me personally came R. T. Rippe, to me known, who, being by me duly sworn, did depose and say: that he/she is Assistant Vice President of THE AETNA CASUALTY AND SURETY COMPANY, the corporation described in and which executed

the above instrument; that he/she knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he/she executed the said instrument on behalf of the corporation by authority of his/her office under the Standing Resolutions thereof.

/s/ JOHANNA M. DEGNAN

Notary Public

[NOTARY SEAL]

My commission expires
March 31, 1984

CERTIFICATE

I, the undersigned, Secretary of THE AETNA CASUALTY AND SURETY COMPANY, a stock corporation of the State of Connecticut, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney and Certificate of Authority remains in full force and has not been revoked; and furthermore, that the Standing Resolutions of the Board of Directors, as set forth in the Certificate of Authority, are now in force.

Signed and Sealed at the Home Office of the Company, in the City of Hartford, State of Connecticut. Dated this 8th day of March, 1985

By /s/ VINCENT A. WALL
Secretary

[AETNA SEAL]

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

SECOND APPLICATION FOR REHEARING

COMES now the Appellant, AETNA LIFE INSURANCE COMPANY, through its undersigned counsel, and hereby applies for a second rehearing on the judgment of this court entered on December 7, 1984 and as grounds for said application would adopt the original Application For Rehearing, with amendment, and its Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984 and for Hearing De Novo, with amendment and further would set forth the following additional grounds:

1. Justice Embry's deposition was given on January 10, 1985 in the Circuit Court of Jefferson County, *T. Eric Embry v. Blue Cross/Blue Shield of Alabama,* Civil Action No. CV-84-500-447 and in his testimony admitted that he was the author of the Opinion of December 7, 1984 and that he had written on the Opinion for the first eight or nine months of 1984, which would have been prior to oral argument held on May 14, 1984. Further, his testimony refers to insurance companies in general and reflects a bias and prejudice against them. (See deposition pages 35, 36 and 38 in exhibit 5 to Motion to Suspend Rules and For Stay of Execution of Judgment)

2. On March 20, 1985, the appellant, through its attorneys, became aware of the contents of Justice Embry's deposition. (See affidavits attached as Exhibits "1" and "2" to the Motion to Suspend Rules and For Stay of Execution of Judgment)

3. The appellant attaches hereto a brief in support of this Second Application for Rehearing and further adopts its Brief filed in support of the original Application For Rehearing and the Brief filed in Support of its Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984 and for Hearing De Novo.

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, Alabama 36609

By: /s/ PETER V. SINTZ
Peter V. Sintz

By: /s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

BRIEF IN SUPPORT OF APPELLANT'S SECOND APPLICATION FOR REHEARING

In denying Appellant's Motions on March 8, 1985, each Justice of this Court passed judgment on his or her qualifications to have participated in the consideration and decision of this case, Appellants' Application for Rehearing, and Appellant's Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984 and for hearing De Novo ("February 21, 1985 Motions"), by implicitly refusing to pass judgment on the qualification of the Honorable T. Eric Embry, this Court necessarily refused to decide Appellant's clear, unequivocal Federal Constitutional challenge to the participation of Justice Embry in the consideration and decision of this case and the February 21, 1985 Motions.

Contrary to the Opinion of Justice Maddox concurring specially as to the ruling of this Court on Appellant's Motion for Disqualification, Justice Embry's disqualification under the Provisions of the Alabama Canons of Judicial Ethics was *not* the "primary thrust" of Appellant's February 21, 1985 Motions. Although Appellant believes that Justice Embry was and is disqualified under those Canons, Appellant's primary contention in its February 21, 1985 Motions, the substance of which is renewed by Appellant before this Court today, is that Justice Embry is disqualified by the Due Process Clause of the Fourteenth Amendment of the Federal Constitution from having participated in the consideration and decision of this case

and all related Motions, including the Application for Rehearing, and that Appellant's Federal Constitutional right to a fair hearing of its case can be vindicated only by the disqualification of Justice Embry, withdrawal of this Court's per curiam Opinion of December 7, 1984 which was in fact authored by Justice Embry, and appointment by the Governor of Alabama of a temporary court to hear, consider and decide Appellant's case *de novo,* all of whose members are qualified to hear and decide Appellant's case De Novo, including all issues in its case raised by Appellant to the present date. In re: *Murchison,* 349 U.S. 133, 136 (1955). Appellant's argument that these remedies are necessary to vindicate its Constitutional rights are not dependent in any way on Justice Embry's continued prosecution through his counsel of his civil action in the Circuit Court of Jefferson County. The proceedings in this case to date are Constitutionally tainted, and that taint can only be removed by withdrawal of the Opinion and a full hearing *de novo* as set forth above.

Appellant's position is that this Court has an institutional duty to decide Appellant's Federal Constitutional challenge set forth in Appellant's February 21, 1985 Motions and renewed in this Court today. Appellant believes itself to be obligated at this point in these extraordinary proceedings to make clear that any action of this Court which does not grant Appellant full vindication of its Federal Constitutional rights will be appealed to the Supreme Court of the United States.

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, Alabama 36609

Original Signed By:

By: Peter V. Sintz
PETER V. SINTZ

Original Signed By:

By: William M. Cunningham, Jr.
WILLIAM M. CUNNINGHAM, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of March, 1985, served a copy of the above and foregoing pleading upon Joseph M. Brown, Jr., attorney for appellees, by hand delivering same and to all other parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

Original Signed By:

William M. Cunningham, Jr.

WILLIAM M. CUNNINGHAM, JR.

Honorable Joseph M. Brown, Jr.
Attorney at Law
1601 Dauphin Street
Mobile, AL 36660

Honorable Charles A. Graddick
Attorney General
250 Administrative Building
Montgomery, AL 36130

Honorable Edgar M. Elliott, III
Attorney at Law
1700 Financial Center
Birmingham, AL 35203

Honorable James T. Upchurch
Attorney at Law
Post Office Box 270
Montgomery, AL 36195

Honorable Thad Salmon
Attorney at Law
2108 East South Boulevard
Montgomery, AL 36111

Honorable Lanny Vines
Attorney at Law
1800 City Federal Bldg.
Birmingham, AL 35203

Honorable Harry Cole
Attorney at Law
Post Office Box 116
Montgomery, AL 36195

IN THE SUPREME COURT OF ALABAMA

Supreme Court No.: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

- VS -

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*

AMENDMENT TO MOTION TO SUSPEND RULES AND MOTION FOR STAY OF EXECUTION OF JUDGMENT

COMES now the appellant, AETNA LIFE INSURANCE COMPANY, through its undersigned counsel, and amends it Motion to Suspend Rules and Motion for Stay of Execution of Judgment by attaching the affidavit of George R. Heitz.

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, Alabama 36609

Original Signed By:

By: Peter V. Sintz
Peter V. Sintz

Original Signed By:

By: William M. Cunningham, Jr.
William M. Cunningham, Jr.

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant*,

-vs-

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees*.

AFFIDAVIT OF GEORGE R. HEITZ

STATE OF CONNECTICUT
COUNTY OF HARTFORD

Personally appeared before me, the undersigned authority in said State and County, GEORGE R. HEITZ, who is known to me and who after being duly sworn, deposes and says as follows:

My name is GEORGE R. HEITZ and I am over the age of twenty-one years. I am employed by the Aetna Life Insurance Company of Hartford, Connecticut. My position is that of Legal Officer and in that capacity I am knowledgeable of the Margaret Lavoie vs. Aetna Life Insurance Company lawsuit.

My first notice of the substance of Justice T. Eric Embry's testimony given in his deposition of January 10, 1985, was when I received and read a copy of the deposition on March 21, 1985. Prior to that date, I had been advised by one of the attorneys with the firm of Sintz, Pike, Campbell & Duke that Justice Embry had mentioned the *Lavoie* case in his deposition. Until I was able to read the deposition I was not aware of the substance of his testimony.

/s/ GEORGE HEITZ

George Heitz

Subscribed and sworn to before me on this 21st day of March, 1985.

/s/ illegible signature

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of March, 1985, served a copy of the above and foregoing pleading upon Joseph M. Brown, Jr., attorney for appellees, by hand delivering same and to all other parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

By: /s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

Honorable Joseph M. Brown, Jr.
Attorney at Law
1601 Dauphin Street
Mobile, AL 36660

Honorable Charles A. Graddick
Attorney General
250 Administrative Building
Montgomery, AL 36130

Honorable Edgar M. Elliott, III
Attorney at Law
1700 Financial Center
Birmingham, AL 35203

Honorable James T. Upchurch
Attorney at Law
Post Office Box 270
Montgomery, AL 36195

Honorable Thad Salmon
Attorney at Law
2108 East South Boulevard
Montgomery, AL 36111

Honorable Lanny Vines
Attorney at Law
1800 City Federal Bldg.
Birmingham, AL 35203

Honorable Harry Cole
Attorney at Law
Post Office Box 116
Montgomery, AL 36195

APPENDIX H

IN THE SUPREME COURT OF ALABAMA

Supreme Court No: 82-426

AETNA LIFE INSURANCE COMPANY, *Appellant,*

-vs-

MARGARET W. LAVOIE and ROGER LAVOIE, *Appellees.*
[Filed Mar 25 1985 Supreme Court of Alabama]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Aetna Life Insurance Company, the appellant abovenamed, hereby appeals to the Supreme Court of the United States from:

(a) The final judgment of the Supreme Court of the State of Alabama of December 7, 1984, affirming the judgment of the Circuit Court of Mobile County against appellant entered in this action on November 4, 1982;

(b) The final order issued by the Supreme Court of Alabama, denying appellant's Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984, and for Hearing De Novo, and overruling the Application for Rehearing entered on March 8, 1985.

(c) The final order issued by the Supreme Court of Alabama, denying appellant's Motion to Suspend Rules and Motion for Stay of Execution of Judgment, entered on March 25, 1985.

This appeal is taken pursuant to 28. U.S.C. § 1257(2).

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, Alabama 36609

By: /s/ PETER V. SINTZ
Peter V. Sintz

By: /s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of March, 1985, served a copy of the above and foregoing pleading upon counsel for all parties to this proceeding by placing a copy of same in the United States mail, First Class postage prepaid.

By: /s/ WILLIAM M. CUNNINGHAM, JR.
William M. Cunningham, Jr.

Honorable Joseph M. Brown, Jr.
Attorney at Law
Post Office Box 66705
Mobile, AL 36660

Honorable Charles A. Graddick
Attorney General
250 Administrative Building
Montgomery, AL 36130

Honorable Edgar M. Elliott, III
Attorney at Law
1700 Financial Center
Birmingham, AL 35203

Honorable James T. Upchurch
Attorney at Law
Post Office Box 270
Montgomery, AL 36195

Honorable Thad Salmon
Attorney at Law
2108 East South Boulevard
Montgomery, AL 36111

Honorable Lanny Vines
Attorney at Law
1800 City Federal Bldg.
Birmingham, AL 35203

Honorable Harry Cole
Attorney at Law
Post Office Box 116
Montgomery, AL 36195

APPENDIX I

THE STATE OF ALABAMA — — — — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA
October Term, 1984-85

82-536 & 82-917

Nationwide Mutual Insurance Co.

v.

Henry Gerrard Clay

APPEALS FROM MOBILE CIRCUIT COURT

[Filed Feb 8 1985 Clerk Supreme Court of Alabama]

ALMON, JUSTICE.

These consolidated appeals involve a claim for bad faith failure to pay a claim on a disability insurance policy. At trial, the court granted a directed verdict for the plaintiff insured in the amount of $46,165.00 on the contract count. The jury returned a verdict for the plaintiff in the amount of $1,250,000.00 on the bad faith count. The trial court denied the defendant insurance company's post-trial motions, and the company appeals.

FACTS

Because the issues turn on fact questions, we include the following detailed statement of facts. The facts are supported largely by the numerous exhibits, including memoranda of conversations from Nationwide's file on Clay's claim. Clay also kept notes of his telephone conversations and while testifying used them to refresh his memory.

Henry Gerrard Clay applied for a policy of disability insurance with Nationwide Mutual Insurance Company on December 8, 1976. Clay was a practicing attorney in Mobile, and he applied for this policy at the instigation of his friend Bill McDowell, who had previously sold him a hospitalization insurance policy with Nationwide. McDowell filled out the application as Clay gave him the information required.

Two answers on the application later gave rise to charges by Nationwide of misrepresentation: To the question, "What is your average earned monthly income?" Clay answered, "$1,800." To the question, "Will the insurance applied for replace existing Disability Income Insurance . . . owned by applicant?" Clay answered, "Yes," and stated the company and amount as "Paul Revere $400/month."

Clay went to the office of Dr. Herbert Allen on December 14, 1976, for a physical examination. Clay testified that he did not remember seeing the doctor, but thought he had only seen a nurse, who took a blood sample and some measurements. The report indicates Clay was having no problems with his eyes. Clay's disability giving rise to the instant lawsuit was cataracts, which were diagnosed on August 29, 1977.

Nationwide issued the disability income policy effective January 19, 1977, but because McDowell told the underwriting department that Clay should be rated a Class AAA risk instead of a Class A risk, the policy was not sent to Clay until this change was made and did not reach him until March.

In the meantime, Clay had called Paul Revere Insurance Company to cancel the disability policy he had with that company. A Paul Revere agent, Leon Adams, called on Clay to ask why he had cancelled his policy. Clay told Adams that he intended to buy a disability policy with

Nationwide. Adams compared the Paul Revere contract with the Nationwide contract and offered Clay increased coverage with Paul Revere. As Adams testified, "I talked him into getting a lot more coverage." On February 4, 1977, Clay applied for disability insurance with Paul Revere in the amount of $2200 per month and a policy was issued on February 26. When he received the Nationwide policy in March, he tried to cancel it, but could not reach McDowell, who had been promoted. Clay allowed both policies to remain in effect, with premiums being paid on a monthly bank draft.

On April 29, 1977, Clay visited Dr. Charles Ivey Williamson for a checkup, complaining that he had had fever recently and was feeling tired and run down. Dr. Williamson conducted lab tests, which showed a possibility of a viral infection affecting Clay's liver, but nothing seriously abnormal. Dr. Williamson recommended a diet and rest. His records indicated that Clay did not complain to him at this time of eye problems.

Clay continued to run a fever and feel sick through the spring and summer. On August 29, he went to Dr. Edwin A. Ross, his optometrist, with whom he had regular checkups. Dr. Ross diagnosed cataracts, which had caused his vision to drop from 20/20 in each eye to 20/40 in the left eye and 20/50 in the right. Dr. Ross testified that Clay's cataracts were in such a position that they caused a severe loss of vision and could not be corrected with glasses. He also testified that the cataracts developed in a short period of time, unlike in older people [1] where they cause a gradual loss of vision. Dr. Ross recommended that Clay see an ophthalmologist. On September 7, 1977, Clay saw Dr. James M. Harrison, who confirmed that Clay had cataracts.

Clay closed his law office, referred his clients with active files to other attorneys, and stored his books, office equip-

[1] Clay was 38 when his cataracts developed.

ment, and other items in a warehouse. On September 26, 1977, Clay filled out a disability claim to file with Nationwide. He stated that the symptoms first appeared "July, 1977 to August, 1977." Clay left blank the spaces on the form for "Monthly income" and "any other Companies with whom you may carry Accident & Sickness insurance." Dr. Harrison completed the attending physician's portion of the form, indicating that Clay was totally disabled from September 7, 1977, "until recovered from surgery," and that the symptoms appeared "gradually."

Nationwide received the claim form at its group claims office in Atlanta on October 3. That office forwarded the form to Nationwide's office in Columbus, Ohio, where it arrived on October 13, 1977. The claim was assigned to Jim Otey, a medical claims examiner, on October 20. On November 10, Clay called to inquire about the status of his claim and requested a reply by telephone. On November 11, he called again. The message in Nationwide's file on Clay's claim includes the notation, "Please Call Today." Nationwide did not return either call.

Clay telephoned twice on November 14, and talked to Otey. Clay testified that when he first called, Otey refused to find his file, saying, in Clay's words, "if he started doing it for me he would have to talk to anybody that had a claim anytime they wanted to talk to him." Otey denied that he ever refused to look for Clay's file. Clay testified that during this first conversation Otey told him he had seen the file, whereupon Clay asked if Nationwide was going to pay. Clay testified that Otey answered,

> " 'Naw, no decision's been made on it yet.' He said, 'but I,' he said, 'I can tell you right now' and he said, 'cataracts are not a disability. They take at least two years to become disabling.' And he said, his exact words, he said, 'there's no way I could be disabled with cataracts.' "

Clay called Otey again on the afternoon of November 14, at which time Clay mentioned to Otey that Dr. Ross had first diagnosed his cataracts. Otey responded that Dr. Ross, instead of Dr. Harrison, would have to file the attending physician's report. Someone at Nationwide had initially told Clay that he should have Dr. Harrison fill out the claim form because Dr. Harrison was a medical doctor and Dr. Ross was not. Otey told Clay that the doctor who originally discovered the cataracts would have to send a statement.

Otey examined the file in detail on November 15. He was concerned whether Clay's cataracts existed prior to the policy coverage, although he had seen the report from Dr. Allen showing Clay had no eye problems on December 14, 1976. Otey had Equifax Services arrange for another doctor to examine Clay. Dr. Dan Rencher, an ophthalmologist, examined Clay on November 21, and sent a report to Equifax on November 23. Dr. Ross also sent a form to Nationwide on November 23 giving his diagnosis of cataracts.

Dr. Rencher's report stated:

> "In my professional opinion there is in Mr. Clay's case the presence of some disability in that he is an attorney at law which necessitates that he read a considerable amount and he is experiencing difficulty doing so. It is my opinion that this disability is due solely to the cataracts."

Dr. Ross's report included the following:

(2A) When did symptoms first appear or accident happen?
Date: Prior to Aug 29, 1977

(B) When did patient first consult you for this condition?
Date: Aug 29, 1977

(C) Has patient ever had same or similar condition?
If "Yes" state when and describe
Yes ☐ No ☒

Neither of these reports clarified whether Clay's cataracts developed prior to the effective date of the coverage. Nationwide received Dr. Ross's report on December 1, 1977, but did not receive Dr. Rencher's report from Equifax until December 16. Otey denied to Clay that Dr. Rencher's report had been received, and later Equifax obtained another report, which stated that in Dr. Rencher's opinion Clay's "visual acuity constitutes a disability in his work as an attorney at law." Nationwide received this copy on January 4, 1978.

Other activity concerning Clay's file continued while these doctors' reports were proceeding. Bill McDowell, who had transferred to Nationwide's office in Birmingham since selling Clay his policy, testified that he saw Clay around Thanksgiving and that at that time Clay's vision was poor and he was keeping the house dark. McDowell talked to Otey on the telephone on November 30, 1977, and said Clay thought Nationwide was "trying to pull something." Otey denied at trial that McDowell had relayed this message, but his notes on the conversation mention it, including the 'anguage just quoted. The notes also state that Otey *"assured"* (Otey's emphasis) McDowell "we had not even thought in that way. Just routine handling as all cataracts were contestable. Exam was 11/21 and we should be getting report soon." Otey's notes conclude with an indication that McDowell responded "OK—carry on."

Clay talked to McDowell on December 2. He testified that McDowell said Otey would pay only when Clay set a date for an operation. Clay then telephoned Otey, who denied that he was waiting for an operation date and said that he was waiting for the report from Dr. Rencher.

Clay said he would call Dr. Rencher to help speed up the report.

Clay telephoned McDowell again on December 5, at which time, as he testified, McDowell told him Otey thought he was working and concealing income and had "made his own disability." When Clay called Otey to ask what he meant, Otey would not discuss it. Clay asked to talk to Otey's superior, but Otey said there was no one else he could talk to except in the legal department.

Clay talked to Otey and McDowell several more times, including once on December 21, when Otey stated that he was still waiting for Dr. Rencher's report, but would not go get the file. As noted above, Nationwide stamped Dr. Rencher's report "received" on December 16. Otey testified that Equifax, in forwarding the report, had not included the claim number, so placing it in the proper file took longer. Clay told Otey that Nationwide had selected Dr. Rencher, Clay had kept his appointment, Dr. Rencher had sent the report a month earlier, and Nationwide was making no effort to investigate.

Clay also complained that Nationwide was still deducting premiums from his checking account even though the policy had a waiver of premiums provision. Otey responded that the premiums would have to continue until he was satisfied of total disability and that company policy was that any premiums that should have been waived would be refunded later.

During this December 21 conversation, Clay continued to request that Otey get the file. Otey suggested that if Clay could give him the claim number, he might be able to retrieve the file. Clay sorted through his papers and, using a magnifying glass, read the claim number to Otey. Clay testified that Otey responded, "well, that proves you can read and we don't owe you any disability," and accused him of concealing income.

Otey also asked Clay if he had any other insurance. Clay's testimony about this exchange includes the following:

> "I said, 'listen you have had this claim here for three months to do it,' and I said, 'listed on the application is a Paul Revere policy.' I said, 'have you even called them or telephoned 'em or written any letters to find out about that Paul Revere policy?' He said, 'no, I'm talking about other policies. Something where you're concealing from us.' I said, 'well, the only thing—' I said, 'I've got a little thing, insurance thing that I sent for the mortgage payments on my house.' . . .
>
> ". . . And he said, 'I know about that.' His exact words says, 'I know about Paul Revere and the mortgage insurance with American Home.' He said, 'do you mean to tell me you have no other disability insurance other than Paul Revere and American Home Mortgage Insurance?' I said, 'that's right. I have no other insurance other than that; no other disability income insurance.'
>
> "Q Did you have any other, please, sir?
>
> "A No. No other disability income insurance. But I knew in the back of my mind that he didn't understand, that he was being a little bit misled but he was misleading himself. This is—Three months had gone by and he hadn't even looked at the file other than to make accusations on the telephone."

On December 30, Clay called Otey, who said the claim had been turned over to the legal department. Around this time, Otey took the file to John Harker, claims attorney for Nationwide. On January 13, 1978, Harker and Otey requested Nationwide's in-house doctor to review Clay's doctors' reports—the file now included Dr. Harrison's report, Dr. Ross's report, and the two reports from Dr.

Rencher—and answer the question, "Noting the degree of sight he has in each eye, would an individual of this occupation be totally disabled?" The doctor returned the form on the same day with the notation, "Not completely and totally unable to perform his usual and customary occupation." Otey mentioned to Harker the probability of other insurance being involved. He testified that taking the claim to Harker effectively terminated his active involvement in handling the file.

On January 11, 1978, O. B. Carr, an insurance investigator with the Alabama Department of Insurance, sent a letter to Nationwide, which reads: "Please advise this department relative to disposition of referenced claim. Mr. Clay alleges to have been continuously totally disabled since September 7, 1977." Nationwide received this letter on January 16.

Also on January 16, Harker wrote Clay stating that Nationwide would not pay the claim. Harker testified that he disagreed with the in-house doctor's conclusion and believed Clay was totally disabled from practicing law. He based the denial of coverage on his conclusion that Clay's cataracts pre-existed the effective date of coverage. Harker's letter stated that Dr. Ross's report "indicates that although he did not treat you until August 29, 1977, symptoms of your condition began prior to 1977." (See the portion of Dr. Ross's report duplicated above.) The letter concluded with a statement that Nationwide would be "more than happy to review" any additional information from Clay and reconsider the claim.

Clay telephoned Harker on January 11, 17, and 18, but was told Harker was not in. He reached Harker on the morning of January 19th before receiving his mail. Harker told him of the letter tentatively denying coverage due to pre-existence of cataract symptoms. After Clay received the letter in the mail later that day, he called Harker back and accused him of intentionally misreading Dr. Ross's

report. Harker told Clay he would immediately send a payment for one month's benefits and approve payment on the claim as soon as Dr. Ross confirmed that Clay did not have cataracts prior to 1977. Clay testified that he did not receive this first check until February 13.

In his notes on the conversation, Harker included a note to have Equifax inquire whether Clay had any other policies. In conducting an investigaton, Equifax learned that Clay had not filed income tax returns for 1975, 1976, or 1977. Nationwide also learned that Clay had a $2200 Paul Revere policy that was a "make over" of the policy mentioned on Clay's application with Nationwide. Clay testified that he talked to Harker on January 31, 1978, and Harker said that if the Paul Revere policy was issued after the Nationwide policy, it wouldn't affect Clay's coverage with Nationwide, but that "they [Nationwide] would pay full coverage." Harker later received a letter from Paul Revere stating that their policy was a "new policy" issued in February 1977 as a make-over of his 1966 policy. When he talked to Clay on February 20, he said, according to Clay, that the Nationwide policy had been issued first. Based on this information, Clay agreed with Paul Revere to reduce his coverage from $2200 per month to $1250 per month with a one-year additional benefit of $150 per month.

During this period, the question of the onset of Clay's disability was settled to Harker's satisfaction. He did not talk to Dr. Ross the day after the January 19 conversation with Clay, but wrote a letter to Dr. Ross on February 7 asking for the date the cataracts appeared. Dr. Ross replied that there had been nothing abnormal when he had examined Clay on November 3, 1976, and no sign of "any significant impairment of visual acuity—until the exam of August 29, 1977." Harker had instructed Otey to request "continuation of disability" statements from Clay and Dr. Ross and include these forms with the check authorized on

January 19, which Clay received on February 13. When Harker received the letter from Dr. Ross on February 23, he sent it to Otey with instructions to pay Clay's sickness disability income. Otey noticed that the "continuation of disability" forms were not in the file, initialed Dr. Ross's letter with a notation "Forms out," and held up the benefits.

On February 28, Nationwide received another letter from O. B. Carr of the Alabama Department of Insurance, referring to the unanswered January 11 letter and requesting Nationwide to advise the department as to the present status of Clay's claim. Harker responded on March 7, stating that he was unable to determine if Nationwide had received the first letter. He recited the history of Clay's application, claim, and the treatment thereof. The letter concluded, "At this time, we are awaiting only return of claim forms from Mr. Clay indicating disability and dates of treatment through the present. Immediately upon receipt of that information, we will be in a position to bring Mr. Clay's disability payments up to date."

When Clay received a copy of this letter on March 9, he called Harker and said there was a lot in the letter that was not true, particularly the statement that Nationwide was merely awaiting forms from Clay. Clay testified that the forms were not inclosed with the check. He said he complained to Harker, "[I]t's been one series of promises after another and you've never said anything about waiting on anything from me . . . . [E]very time that you say you'll pay as soon as you get a medical report you don't pay." Clay threatened to have the insurance department investigate or to sue, whereupon Harker said, according to Clay, "[I]f you file suit, you won't get a nickel for at least ten years."

Harker offered to send another one-month "good faith" payment of $1300, and Clay responded, "[A]bsolutely not . . . either pay it up or deny the claim." Harker agreed

to pay the benefits current to February 1, and Clay agreed to return a current medical report if Harker sent him a form along with the payment. Harker's notes on this conversation read:

> "Pay another payment to Feb. 1, 1978. He will send forms. I don't believe we can justify a delay since his condition could not improve without surgery. Also suggest we send Equifax now to investigate if office is open."

An Equifax agent asked Clay on March 15 to release his income tax returns, which Clay refused to do. The agent called Otey to tell him this, and that Clay apparently had not filed a return for 1976. Also on March 15, Dr. Ross completed the continuation of disability forms and sent them to Nationwide. They were received on March 21.

On March 28, Harker wrote Clay:

> "In investigating a claim which you have against the above indicated policy, it has come to our attention that there may be certain information which was withheld from us on the application; information which was necessary in determining the amount of disability insurance for which you would have been eligible under our company rules.
>
> "Based on that fact, I find that we will need some proof of the income which you represented on your application in December, 1976. That is, at that time, you indicated you were averaging $1,800 per month. Information has come to our attention that you were making far less than that and as such, we will need proof of income.
>
> "Although, as I am sure you are aware, you have no duty to provide us with income tax records[, a] copy of your tax return would effectively close the matter. Any other information you can provide showing income would be quite beneficial."

Harker testified that if Clay had not filed income tax returns, "there was a strong possibility in my mind that he had had no income. . . . If his income was less, it would have affected the policy as well based on the other insurance that he had."

Clay testified that when he received this letter he called Harker and told him:

> "I thought the only reason he'd asked for that is because Bill McDowell had told him I didn't have tax returns but that I did have . . . that I kept good records in my office and I said it'd be fairly easy for me to verify my income for 1976 but . . . I did not believe him when he said it would close the matter. . . . I said, if there's anything that's come to your attention that's new and you have a reason to ask for the tax return, . . . I will try to verify my income during 1976 just like you said. But, I said, without that, . . . it's unreasonable for you to ask for it at this point; you've had six months to investigate it."

His testimony continued:

> "Q What did he say, please?
>
> "A Well he said that the company had discussed it and that was the position they were gonna take . . . [b]ut he said he didn't think that he had to tell me the details of his investigation. So he wouldn't tell me why he wanted the income tax return."

On April 5, O. B. Carr again wrote Harker, stating that "Obviously, Mr. Clay is concerned over your change of plan." Harker wrote back, asking Carr to help Nationwide to persuade Clay to submit his income tax returns. Clay filed this suit on July 14, 1978.

PROCEEDINGS BELOW

Clay's originial complaint, filed on July 14, 1978, sought damages in the amount of $100,000 for breach of contract. Nationwide answered with a general denial of the allegations of breach, stating that "at this time it has still not completed its investigation." Nationwide included with its answer a request for production of Clay's federal and state income tax returns and his hospital, doctor, and medical reports. When Clay did not respond, Nationwide filed a motion for the court to compel Clay to produce the documents. The court granted this motion on February 8, 1979, giving Clay 20 days to comply. When he did not, Nationwide filed on March 6 a motion styled "Motion for Default Judgment," which we take to be a motion to dismiss pursuant to Rule 37(b)(2)(C), A. R. Civ. P.

In response to this motion, Clay stated that he had not filed income tax returns for the years in question. He gave a deposition concerning these matters on May 30, 1979. The case was continued several times, and in March 1980, Clay's original counsel withdrew and his present counsel entered an appearance. The parties conducted further discovery and the court granted continuances until, on April 29, 1981, Clay filed his first amended complaint.

The amended complaint included three counts: one for bad faith "in failing and refusing to pay the plaintiff the benefits due under such policy and in continuing to require and accepting premiums for said policy;" a second count for fraud; and a third count for breach of contract. The first two counts each sought $1,500,000 in damages, and the third sought $150,000. This amendment came shortly after this Court recognized a cause of action against insurers for bad faith failure to pay a claim in *Chavers v. National Security Fire & Cas. Co.*, 405 So. 2d 1 (Ala. 1981).

Nationwide sought discovery from Clay of documentation of Clay's income for 1970 through 1980. On May 8,

1981, Nationwide filed a motion to compel Clay to respond to these discovery requests. On January 28, 1982, Clay filed a motion to limit discovery. The court on February 5 granted the motion "to the extent that the Plaintiff shall at this time produce to the Defendant the amount of deposits to his attorney accounts during the period in question." Clay supplied a listing of deposits for the years 1969 through 1976. Approximately two weeks before trial, Clay provided records of his bank deposits for January through September of 1977.

On February 22, 1982, Clay filed a second amended complaint, which corrected some of the factual allegations. Nationwide filed an answer to this amended complaint (it had not answered the first amended complaint), denying that it had acted in bad faith and stating that it received information in March 1978 which prevented the previously anticipated resolution of the claim. Clay filed a third amended complaint on April 23, 1982, amending the *ad damnum* clauses of each count to claim $3,000,000.

Nationwide's answer to the third amended complaint added defenses that Clay's earnings were insufficient to provide the benefits provided in the policy; that any benefits due were to be prorated with Clay's other disability income policies; that Clay had misrepresented his income in obtaining the policy; that, to obtain the Nationwide policy, Clay had represented he would cancel the Paul Revere policy, but instead had increased it; that Nationwide had breached no duty of good faith; and that Nationwide had a lawful basis for ceasing to make payments. Clay points out that Nationwide also denied having demanded premium payments and added as a defense that Clay "failed to mitigate his claim by undergoing corrective surgery within a reasonable period of time after becoming disabled." Nationwide withdrew this defense on the morning of trial.

The case went to trial on December 13, 1982, and the trial lasted through December 17. The trial court denied motions by Nationwide for directed verdict at the close of Clay's evidence and at the close of all the evidence. At the close of all the evidence, the trial court granted Clay's motion for directed verdict on the contract count and denied it on the bad faith count. The court granted a directed verdict for Nationwide on the fraud count. On the contract claim, the trial court awarded $46,165.00. The jury returned a verdict of $1,250,000.00 on the bad faith claim. The trial court later denied Nationwide's motion for judgment notwithstanding the verdict, new trial, or remittitur. Nationwide appealed.

ISSUES

Nationwide states eleven issues, but argues them under the following four headings: 1) The trial court erred in directing a verdict for Clay under the contract claim; 2) The trial court erred in denying Nationwide's motions for directed verdict on the bad faith claim; 3) Various rulings by the trial court improperly and materially prejudiced the defendant; and 4) The trial court erred in refusing to order a remittitur. We shall discuss the issues under corresponding hearings.

THE CONTRACT CLAIM

Nationwide argues that the court should not have directed a verdict for Clay because there was evidence in favor of Nationwide's position that it was not liable on the contract claim. Nationwide asserts that there was substantial evidence that Clay misrepresented his income and falsely stated that he would cancel the Paul Revere policy. According to Nationwide, each of these misrepresentations provided a basis upon which to void the policy. Nationwide further argues that the dispute as to the amount due on the policy makes the directed verdict improper.

Regarding Clay's statement on the application that his income was $1800 per month, Nationwide's primary argument is that, although Clay's deposits to his law office account for 1976 totalled $26,714.41, his office overhead averaged $900 to $1000 per month and thus his income was less than $1800 per month. Nationwide argues that it does not have to prove that Clay intentionally misstated his income, because Code 1975, § 27-14-7, provides that

> "Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise."

Nationwide argues that it would not have issued as much coverage if it had known the true amount of Clay's income.

This argument depends upon Nationwide's position that "average earned monthly income" on the application means "net income" after deduction of office overhead. Nothing on the application compels such a conclusion, but Nationwide argues that its "Agent's Portfolio," introduced as Plaintiff's Exhibit 13, defines income so as to require deduction of expenses. Under "Monthly Indemnity Benefits," that exhibit defines "earned income" as "1. Income before taxes arising from occupation, or 2. Net

income, after expenses, but before taxes, arising from the operation of a business."

The trial court observed that

> "there's no definition of income in the policy. The policy is to be construed against the insured [sic]. There is gross income and there's net income. If a person is disabled to work it doesn't presuppose that he's going to go out and fire his secretary and close his office immediately. He may go back to work in six months. And I would think that it means gross income."

Although the record indicates that the trial court stated that the policy is to be construed against the "insured," this is clearly either a typographical error or a slip of the tongue. The trial court correctly applied the rule that ambiguities are to be construed against the insurer. See the many cases cited in 12 Alabama Digest *Insurance* Key # 146.7(1). See, for example, *Employers Ins. Co. of Alabama v. Jeff Gin Co.*, 378 So. 2d 693 (Ala. 1979); *Alabama Farm Bureau Ins. Co. v. McCurry*, 336 So. 2d 1109 (Ala. 1976); and *Mutual Benefit Health & Accident Ass'n of Omaha v. Reid*, 279 Ala. 136, 182 So. 2d 869 (1966).

Counsel for Clay cited to the court the cases of *Rambin v. Continental Casualty Co.*, 186 So. 2d 861 (La. Ct. App. 1966), *writ refused*, 249 La. 578, 187 So. 2d 740 (1966); and *Allstate Ins. Co. v. Winnemore*, 413 F.2d 858 (5th Cir. 1969). In the former, the Louisiana court held that " 'average monthly earnings' is ambiguous," that " 'earnings' . . . does not necessarily mean 'net earnings' unless qualified in some manner," and that the interpretation most favorable to the insured would be adopted. 186 So. 2d at 864. In the latter case, the Fifth Circuit Court of Appeals stated that even though an innocent misrepresentation

might void the policy, "[W]e think it is possible that if Winnemore did not know or could not be expected to know the meaning of 'earnings' on the insurance application, he did not make a misrepresentation." 413 F.2d at 863.

Nationwide cites *General Accident, Fire & Life Assurance Corp. v. Jordan,* 230 Ala. 407, 411, 161 So. 240, 242 (1935), for the Court's statement, "That [plaintiff] was repaid for his business expenses is not, in our opinion, a part of his earnings." Reimbursement for out-of-pocket expenses, however, is quite different from fees earned by an attorney: in the former case, the individual pays his expenses out of ordinary income, and inclusion of reimbursement as income would cause the sum to be included twice. On the other hand, an attorney would normally consider the entire amount of a fee paid to him as income, and could not be expected to deduct expenses unless specifically instructed to do so.

We agree with the trial court and the cited authorities that Nationwide's failure to tell Clay that "average earned monthly income" means *net* income prevents it from avoiding coverage on this ground. Furthermore, even within Nationwide's internal rules, there is an ambiguity as to whether Clay's law practice would constitute an occupation or a business, and only in the latter instance would expenses be deducted. Finally, the "Relation of Earnings to Insurance" clause of the policy contemplates the use of a two-year period to determine average monthly earnings. In the two-year period preceding the application, Clay averaged over $2,000 income per month even after the deduction of office expenses. Thus, the trial court's decision to rule for Clay on this issue was eminently proper: not only did Clay have no reason to suspect he should give a "net income" figure, but also Nationwide's own rules, interpreted strictly against the insurer, preclude the use of a one-year net income average for a professional, whose income arises from an occupation, not a business.

Nationwide also argues that the trial court erred in granting a directed verdict on the contract count, because Clay represented that he would cancel the Paul Revere policy, but, instead, increased it. This argument has two branches: one, that Nationwide should not have to pay benefits because of the misrepresentation; and two, that the trial court should not have directed a verdict because the existence of other insurance presented a factual question on the amount of benefits due. Clay's response essentially is that he did cancel the existing policy as he said he would do, and the fact that he took out higher coverage with Paul Revere after he obtained the Nationwide policy does not allow Nationwide to avoid coverage under its policy. He asserts that the calculation of benefits due was a simple matter of arithmetic and Nationwide made no objection before the jury retired to the trial court's performing this calculation.

The trial court made the following remarks during argument about the admissibility of evidence on this issue:

> "That's not going to be a defense as far as this Court is concerned. . . . A man notifies an insurance company that he's going to cancel it and the agent comes back out and talks him out of it; it's absolutely clear to me that it's not a misrepresentation if he did what he said he was gonna do. And, that's undisputed, isn't it?
>
> "[Attorney for Nationwide]: Your Honor, it's not his intentions, it's what he does, his actions.
>
> "The Court: Well, you're asking him to be held responsible for what the insurance company caused.
>
> ". . . .
>
> "You know, to me it is just absolutely irrelevant. I mean, because the representation is that he was go-

ing to cancel it. That's what he tried to do. That's undisputed. Then he decides he's going to get another policy. That's undisputed. How the company treated that new policy, he didn't even know about that. What difference . . . I can't see what difference it makes.

". . . .

"I don't know how you can possibly hold an insured to what an insurance company does, how they internally treat something. That's the reason I don't see any relevance."

Paul Revere's agents treated the policy issued to Clay in February 1977 as a "make-over" of the policy he had at the time he applied for the Nationwide policy. Nationwide insists that this indicates Clay did not cancel the existing policy and thus that he made a misrepresentation when he said he would cancel it; and that this misrepresentation gives Nationwide a basis for rescinding its policy.

The difference between increasing the pre-existing policy and taking out a new policy after securing the Nationwide policy comes into play for the following reason: if Nationwide takes an application to supplement an existing policy, it will deduct the existing coverage from the amount of coverage it is otherwise willing to provide. Nationwide will write disability insurance for approximately half of an insured's income, reasoning that more coverage would be "overinsurance," tempting the insured to prolong a disability. Thus, with Clay stating that he made $1800 per month, if he had said he would keep the Paul Revere coverage of $400 per month, Nationwide would have provided only $500 additional coverage.

On the other hand, as a Nationwide underwriter testified, Nationwide cannot control what an insured does after he takes out a policy with Nationwide. Therefore, the policy includes the "Relation of Earnings to Insurance" clause.

This clause provides that, if the total "loss of time" coverage exceeds the insured's monthly income "at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability . . . , whichever is greater," Nationwide will pay a prorated amount of benefits and return the excess premiums.

As it turned out, when Clay made his claim Paul Revere reduced its coverage to $1250 per month with an additional one-year benefit of $150 per month. The trial court calculated the benefits due under Clay's Nationwide policy when it directed a verdict on the contract claim. These calculations were not preserved in the record. Clay, in his appellee's brief, provides calculations which would justify the $46,165.00 award made by the trial court. He states, moreover, that these calculations give Nationwide the benefit of the doubt in three respects: they allow proration of his Nationwide policy in spite of Harker's representation that the Paul Revere, not the Nationwide, policy should be prorated; they allow the relation-of-earnings provision to apply to the $1300-per-month rider, which is inconsistent with Nationwide's position that the waiver-of-premium provision in the policy did not apply to the rider; and they do not give Clay any refund of excess premiums for prorated benefits.

Clay further makes the argument that when Harker denied coverage on the basis of a pre-existing condition, he waived the defense of misrepresentation regarding cancellation of the Paul Revere policy, because he already knew of the $2200 Paul Revere policy.

Nationwide argues that the "stacking" of coverage shows an intent to defraud. Clay's attorney responded at trial that Nationwide had not pled a defense raising this issue, and the court agreed: "It doesn't make any difference how many policies he has unless you are relying upon a defense that he knew he was going to be disabled."

During this colloquy, which occurred during Clay's testimony on the third day of trial, the court remarked:

> "Well I'll just tell you and I'll put it on the record, I'm prepared at this time to direct a verdict for the Plaintiff on the main claim and submit only the issue of bad faith to the jury. I just don't see any, absolutely no defense and I don't understand why this claim was not paid. It's something I must decide. The jury must decide whether or not it was denied based on bad faith. But I don't see any legitimate arguable defense in this case.
>
> ". . . .
>
> "I just don't think at this point, absent some other evidence, that there is any arguable defense based upon the defenses you presented to me . . . ."

Nationwide argues that these remarks were improper because it had not yet begun to put on its case. However, the court did not direct a verdict at this time, but did so only at the close of all the evidence. Moreover, the court stated that its conclusion was tentative, "absent some other evidence."

Nationwide points to the fact that Clay made no answer to the question on the claim form asking whether he had other insurance. The question, however, asked for "any other Companies with whom you may carry Accident & Sickness insurance." Clay testified that he thought of disability coverage as "income insurance" and thought the question meant medical insurance. Indeed, Clay's policy is titled a "Disability Income Policy." See *Mutual Benefit Health & Accident Ass'n of Omaha v. Reid*, 279 Ala. 136, 182 So. 2d 869 (1966), in which the Court held that a clause in a health and accident policy referring to "other insurance" did not include a life insurance policy providing additional benefits for death or disability by accidental means.

At any rate, when he talked to Otey on the telephone, Otey said he was aware of the Paul Revere and National Home policies. Furthermore, the existence of the Paul Revere policy came to Nationwide's attention before Harker denied coverage based on a pre-existing condition, so Clay argues that Nationwide waived any defense on this basis.

We find no error in the trial court's action. Paul Revere issued the $2200 policy after Nationwide issued its policy. Since the higher Paul Revere policy was not in existence at the time Nationwide issued coverage, it could have had no effect on Nationwide's decision to issue its policy. Therefore, while the Paul Revere policy might have an effect on the amount of benefits due under the Nationwide policy, it could not serve to void the Nationwide policy completely.

Neither does Nationwide present any error in the trial court's decision to calculate the amount of benefits due under the contract. The only objections Nationwide made were to the general issue of directing a verdict on the contract count. When the trial court repeatedly stated that it would calculate the benefits, Nationwide made no objection. Neither did it make any effort to preserve a record of the manner in which the trial court made the calculation. Thus the only question presented for our review is the actual decision to direct a verdict on the contract count, and we have resolved that question above.

THE BAD FAITH CLAIM

Nationwide argues that the numerous disputes raised questioning Clay's disability, income, and other insurance show that there were arguable reasons for denying the claim and thus it was error for the trial court to deny its motion for directed verdict on the bad faith claim.

The trial court correctly instructed the jury on the elements of an action for bad faith refusal to pay an insurance claim:

> "An insurer is liable for its refusal to pay a direct claim when there is no lawful basis for the refusal coupled with actual knowledge of that fact.
>
> "No lawful basis means that the insurer lacks a legitimate or an arguable reason for failing to pay a claim. When a claim is fairly debatable, the insurer is entitled to debate whether the debate concerns a matter of fact or one of law.
>
> "In order for the Plaintiff to recover, he must satisfy you from the evidence as to the following things:
>
> "(One) That there was an insurance contract between the parties and a breach of that contract by the Defendant.
>
> "(Two) An intentional refusal to pay the insurance claim;
>
> "(Thirdly) The absence of any arguable or legitimate reason for that refusal; the absence of a debatable reason to pay the claim [sic];
>
> "And, lastly, the insurer's knowledge or actual knowledge of the absence of any legitimate or arguable reason.
>
> "In short, the Plaintiff must go beyond the mere showing of non-payment and must prove a bad faith non-payment. A non-payment without any reasonable grounds for dispute, or, stated differently, the Plaintiff must show that the insurance company had no legal or factual defense to the insurance claim.

> "Whether an insurance company is justified in denying a claim under a policy must be judged by what facts it had before it at the time the decision was made to deny the claim."

We note that these instructions omitted the element of "intentional failure to determine whether or not there was any lawful basis for such refusal." See, e. g., *Cincinnati Ins. Co. v. Little,* 443 So. 2d 891 (Ala. 1983); *National Savings Life Ins. Co. v. Dutton,* 419 So. 2d 1357 (Ala. 1982); and *National Security Fire & Cas. Co. v. Bowen,* 417 So. 2d 179 (Ala. 1982).

Nationwide argues that the element of refusal to pay is lacking because Nationwide made four payments on the claim and ceased only because Clay, instead of providing income information in response to Nationwide's March 28, 1978, letter, filed this lawsuit.

Clay responds that Nationwide's repeated refusals to cooperate justified him in disbelieving the letter's statement that the income information would settle the matter. He states that the course of negotiating the claim—the failure to return his calls, the refusals to locate his file, and the denials of receiving letters and reports (which did in fact turn out to be in his file)—show at least a bad faith failure to investigate, if not that Nationwide's periodic refusals to pay were made with actual knowledge of a lack of an arguable reason.

Clay also argues that Harker's decision to deny coverage based on a pre-existing condition waived a defense of misrepresentation that the Nationwide policy would replace the Paul Revere policy. He says this choice of grounds for denying the claim constitutes a waiver because Harker knew at the time he made this denial of coverage that Clay had a Paul Revere policy in effect. We need not reach this claim that such a waiver shows

that Nationwide later raised the "other insurance" and "insufficient income" grounds in bad faith. There was sufficient evidence of bad faith assertion of these grounds without a finding that Nationwide had waived them as a matter of law.

Harker stated that he decided that Clay might not have sufficient income on the sole basis that Clay had not filed income tax returns, and he refused to explain to Clay why he wanted the income information. This evidence supports a finding that Harker's attempt to have Clay prove he was entitled to coverage was made in bad faith. When this evidence is considered along with the evidence of Nationwide's seriatim assertions of grounds for denying coverage, which were not supported by the facts and documents before Otey and Harker, but only by their assumptions, it becomes clear that the evidence was sufficient to go to the jury on the bad faith claim. Therefore, the court did not commit error in denying Nationwide's motion for directed verdict on that claim.

RULINGS BY THE TRIAL COURT

This group of arguments presupposes that the trial court was in error on the merits on various aspects of the case. Most of the rulings complained of have been set out or discussed specifically above. We need not address the others explicitly because to do so would only require a reiteration of the holdings already made herein.

REMITTITUR

Nationwide insists that the verdict on the bad faith claim was excessive under the facts of the case. We disagree. The uncooperative, intransigent behavior of the Nationwide agents is the very thing the bad faith action is designed to prevent. The verdict is large, but not out of proportion to the wrong.

The judgment is affirmed.

AFFIRMED.

Faulkner, Jones, Shores, Embry, and Adams, J.J., concur.

Torbert, C. J., dissents in part and concurs in part, with opinion, in which Beatty, J., concurs.

Maddox, J., dissents with opinion.

TORBERT, CHIEF JUSTICE (dissenting in part and concurring in part).

I dissent from that part of the majority opinion which affirms the bad faith judgment for Clay. Once again we are faced with a bad faith claim where the facts unquestionably show that the insurer's conduct was not an example of how to properly process a claim made by an insured. To the contrary, the claim was badly handled, but this is clearly not the issue here. And as I said in *Aetna Life & Casualty Insurance Co. v. Lavoie,* [Ms. December 7, 1984] —— So. 2d —— (Ala. 1984), and *Continental Assurance Co. v. Kountz,* [Ms. December 21, 1984] —— So. 2d —— (Ala. 1984), alternatives to the tort of bad faith should be pursued in order to regulate the improper conduct of insurers. However, the question presented here is whether a jury could find that this insurer's conduct rose to the level of "bad faith" as currently defined by this Court.

First, I will address the propriety of the directed verdict on the contract claim. Nationwide contends that Clay's misrepresentation of income on the application entitles Nationwide to void the policy. Obviously, the first inquiry should be whether Clay in fact made a misrepresentation as to his "average earned monthly income." Nationwide maintains that the term "average earned monthly income" means the average of net monthly income, that is, gross

income less expenses. However, there is no evidence that Clay knew that Nationwide meant *net* "average earned monthly income." It is only if neither Clay's net nor his gross "average earned monthly income" was the amount stated that it could be said that Clay misrepresented his income. At trial it became clear that using either a one-year or two-year average of monthly earnings prior to the disability, Clay's gross income was at least the amount stated in the application. Under the two-year average method, his net income also was at least the amounted stated in his application. The trial court's finding that there was no evidence to support the misrepresentation claim was correct.

Clay's level of income was important for another reason. The extent of Nationwide's liability under its "relationship of earnings to insurance" clause was a function of two factors, Clay's income and the amount of loss-of-time coverage Clay held with other insurers. I find no error in the trial court's determination of the extent of Nationwide's liability based upon the information produced at trial.

However, while at trial there was sufficient information from which the extent of Nationwide's liability could be determined, that information was not made available to Nationwide until just before trial. Whether Nationwide acted in "bad faith" depends upon whether at the time of denial of benefits, Nationwide had a debatable reason for denying the claim.[1] On the initial claim form submitted by Clay, the questions asking for monthly income and whether the insured had other insurance were not answered. Subsequently, Nationwide learned that Clay had not filed federal income tax returns for the years 1975, 1976, and 1977. The facts that Clay had not disclosed his

[1] This is clearly a "first tier" bad faith case, as the trial court did not even charge the jury as to the "second tier" of bad faith.

income on the claim form and that he had not filed tax returns for the three years preceding his disability were sufficient to create a debatable reason as to whether Clay had sufficient income to entitle him to the full benefits of the policy. Clay's adamant refusal to reveal any financial information, no matter how justified he may have felt in refusing to answer, certainly served to confirm Nationwide's concerns that Clay's income was not what Clay originally represented in his application.

I believe that Nationwide had a debatable reason for questioning the extent of its liability and that the existence of this debatable reason precludes a finding of bad faith.

Beatty, J., concurs.

MADDOX, JUSTICE (Dissenting).

I believe there was at least a "scintilla" of evidence of a factual dispute between the parties over whether the terms "average earned monthly income" in the policy meant "net income" after deduction of office overhead; therefore, a directed verdict on the contract count was error, in my opinion. On the bad faith portion of the claim, I remain convinced that these disputes could best be resolved by the procedure I outlined in my dissent in *Continental Assurance Co. v. Kountz* [MS. 82-793, December 21, 1984], —— So. 2d —— (Ala. 1984).

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-728

AETNA LIFE INSURANCE COMPANY, *Appellant,*

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the judgment of the Supreme Court of Alabama, case No. 82-426, entered December 7, 1984 is stayed pending receipt of a response to the application and further order of the undersigned or of the Court.

THIS ORDER is conditioned upon posting with the Clerk of Mobile Circuit Court of a good and sufficient bond. Said bond is to be conditioned upon the full satisfaction of the judgment of the Alabama courts, with costs and interest and damages for delay, if for any reason this appeal is dismissed or the judgment is affirmed.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court
of the United States

Dated this 26th day of March, 1985.

84-1601 (3)

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. A-728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

JACK N. GOODMAN *
JOHN A. RITCHIE
ELIZABETH A. FERRELL
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

May 9, 1985

QUESTIONS PRESENTED

1. Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing or afterwards, contrary to established state practice, and which were not passed upon by that court, are within this Court's jurisdiction.

2. Whether an Alabama statute which increases the amount of money damages awarded in civil cases if the judgment is affirmed on appeal raises a substantial federal question.

3. Whether the decision by one justice of the nine-member Supreme Court of Alabama not to disqualify himself in one case presents a substantial question under the Due Process Clause of the Fourteenth Amendment.

4. Whether the imposition by a state of actual and punitive damages sounding in tort for bad faith denial of insurance benefits presents a substantial question under the Contracts Clause and the Eighth Amendment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. A-728

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, Appellees move to dismiss this appeal on the grounds that 1) the federal questions sought to be reviewed were not timely and properly raised before the Supreme Court of Alabama and were not passed on by that court; and 2) the federal questions presented are not substantial.

STATEMENT OF THE CASE

In this case, Appellant Aetna Life Insurance Company (Aetna) seeks this Court's review of a decision of the Supreme Court of Alabama affirming a judgment against Aetna for actual and punitive damages resulting from Aetna's bad faith refusal to honor an insurance claim presented by Appellees Margaret W. Lavoie and Roger J. Lavoie, Sr. The Jurisdictional Statement carefully avoids mention of any of the facts on which the Alabama courts based their decisions [1] and wrongly characterizes

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[1] Significantly, none of the dissenting members of the Alabama court disputed the factual conclusions which support the majority opinion. The facts recited here, therefore, represent the unanimous holding of the Supreme Court of Alabama.

the Alabama Supreme Court's decision as one radically altering the facts found by the trial court and the state of the law of bad faith in Alabama.

The Alabama court summarized the evidence concerning Aetna's conduct which brought on the litigation as follows:

> "(1) Aetna took the position that a woman who was bleeding bright red blood from the rectum, had flight of ideation, was acutely ill, and demonstrated personality changes, should have been treated as an outpatient.
>
> "(2) Aetna made its initial denial of the subject claim without any legal justification, and with no medical opinion to support the denial of a complicated medical treatment claim.
>
> "(3) Aetna made a second denial without any medical decision whatsoever, in violation of the established company procedure for handling such claims.
>
> "(4) Upon receiving medical letters detailing the need for hospital confinement and letter of inquiry from Lavoie's attorney, Aetna decided to wait to see if the Lavoies were going to file suit.
>
> "(5) Aetna made a third denial of the claim without any medically qualified opinion to support the denial, again in violation of the company's established procedures.
>
> "(6) Aetna intentionally misrepresented to the Lavoies that the claim had been repeatedly reviewed by members of the medical department.
>
> "(7) Aetna never had the 'most important medical information' available on this file reviewed by any medical doctor during the course of the four denials." App. 35a-36a [2]

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[2] App. —— refers to the Appendix to the Jurisdictional Statement.

Further, the Alabama court pointed to evidence of misconduct by Aetna after the litigation began, including the use of an affidavit to support a motion for summary judgment which Aetna knew was contradicted by the affiant's deposition testimony, and false testimony from key Aetna witnesses at trial which contradicted earlier testimony or was subsequently admitted to be false by the witness. (App. 36a-38a). Based on this evidence, the Alabama court held that "[t]he jury could have rightfully concluded, and apparently did, that [this] was nothing more than an attempt to cover-up, through deceit, past frauds committed in handling the Lavoie claim." (App. 37a).

Aetna claims that the Alabama Supreme Court wrongly based its opinion on "findings" of fraud and conspiracy. However, the Alabama cases prior to this one made clear that the tort of bad faith denial of an insurance claim is "merely a species of fraud," *Dumas v. Southern Guaranty Insurance Co.*, 408 So. 2d 86, 89 (Ala. 1981), involving a "breach of a known duty, *i.e.*, good faith and fair dealing, through some motive of self-interest or ill-will." *Gulf Atlantic Insurance Co. v. Barnes*, 405 So. 2d 916, 924 (Ala. 1981). It was entirely normal, therefore, for the court to refer to "fraud" in discussing Aetna's conduct without in any way implying a cause of action other than the one on which the trial court granted judgment.

Aetna repeatedly states that the decision of the Supreme Court of Alabama overruled two earlier cases which, Aetna claims, held that no bad faith denial could be found when either (1) a partial payment had been made, or (2) a directed verdict on the underlying contract claim would not have been proper. Neither contention is supported by the prior Alabama cases.

While an earlier case suggested that as a general matter partial payments would be persuasive evidence of a lack of bad faith, the determination remained one of fact. The majority below found that the facts in this record

showing bad faith outweighed any favorable inference stemming from Aetna's partial payment (App. 33a). Justice Maddox' dissent agreed that a "partial payment by an insurer of a claim would [not] preclude a finding of bad faith refusal to pay. . . ." (App. 62a).

As to the necessity of a directed verdict, subsequent to the decision in *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982), relied upon by Aetna, the Alabama court pointed out in *Safeco Insurance Co. v. Sims*, 435 So. 2d 1219, 1223 (Ala. 1983), that "[t]he standard for testing a bad faith claim is not found in either the adjudication of a justiciable controversy or the judgment on the merits of the contract claim." Justice Jones' concurring opinion in *Safeco* also noted that "[t]his 'directed verdict on the contract claim' test is not to be read as requiring in every case . . . that the tort claim be barred unless the trial court has literally granted plaintiff's motion for a directed verdict. . . ." *Id.* at 1225. Contrary to Aetna, the Alabama court's opinion here did not overturn settled law. As Chief Justice Torbert noted in dissent, "a blind adherence to the directed verdict rule would essentially abolish the tort." (App. 54a).

ARGUMENT

I. THE FEDERAL ISSUES RAISED BY AETNA WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA

It is a fundamental prerequisite of this Court's jurisdiction over a decision from a state court that the issues sought under federal law have been presented to and decided by the highest state court. *Illinois v. Gates*, 462 U.S. 213 (1983); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 (1977). Aetna concedes (Jurisdictional Statement at 8) "that it has the burden of persuading this Court that

it has jurisdiction over this appeal and that there is no jurisdictional or prudential bar to this Court's deciding each of the four questions presented."

Through a tangle of reasoning, in which the basis of each claim appears to rest on the acceptance of another, Aetna argues that, despite the fact that none of its constitutional arguments were addressed by the Alabama Court, all of them were either properly presented or, if not timely raised, are nonetheless entitled to be reviewed on prudential grounds. Further, Aetna argues (Jurisdictional Statement at 14) that if one of the issues was properly raised, a lesser standard should apply to determine whether review could be had of the remaining questions. This is contrary to *Illinois v. Gates*, in which, despite the fact that a federal issue concerning the application of the Fourth Amendment had been raised below, the Court held that a separate issue concerning the scope of the exclusionary rule which had not been pressed in the state courts could not be entertained. That holding followed the settled rule of *Dewey v. Des Moines*, 173 U.S. 193 (1899), that this Court's review is confined to federal questions which are presented on the record before it, and does not include other federal questions that might have been, but were not, pressed below.

In *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942), the federal issue was first raised in a brief to the Tennessee Supreme Court. This Court dismissed an appeal because:

> "Appellant has failed to establish that under Tennessee practice such a contention can be availed of if advanced for the first time in the appellate court . . . and appellant's burden is to show affirmatively that we have jurisdiction."

Applying these principles to the case at bar, Aetna has not satisfied its burden of showing that any of the four constitutional claims pressed in this Court were properly presented under Alabama practice to the state court. Therefore, the appeal should be dismissed.

A. The Challenge to the Affirmance Statute Was Not Timely

The first mention of Aetna's constitutional challenge to the application of Ala. Code section 12-22-72 came in its brief filed December 28, 1984 in support of its application for rehearing.[3] "Ordinarily the federal question is presented too late if it . . . is not advanced until a petition for rehearing addressed to the decision of the highest state court." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 at 701 (1977).

Alabama procedure does not permit parties to raise new questions on rehearing. In *Kirkland v. Kirkland*, 281 Ala. 42, 198 So. 2d 771, 777 (1967), the Supreme Court of Alabama held:

> "We cannot sanction the practice of bringing up new questions for the first time in application for rehearing. Robinson v. Allison, 97 Ala. 596, 604, 12 So. 382, 604 [sic].
>
> "An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered."

Similarly, in *Lovett v. Uptain*, 450 So. 2d 113, 116 (Ala. Civ. App. 1983), the court stated:

> "After an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case."

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[3] No mention of the constitutional issue was made in Aetna's application for rehearing filed the week before. Ala. R. App. P. 40 requires briefs to be filed at the same time as the application for rehearing. Aetna apparently was granted an extension of time within which to file its brief. In an identical situation, the Supreme Court of Louisiana held that an extension of time for the brief "does not give [counsel] the right to raise issues therein that had not heretofore been made in his application for rehearing," and refused to consider a new argument. Gautreux v. Harang, 190 La. 1060, 183 So. 349, 374 (1938); *see* Lomenick v. Hartford Accident and Indemnity Co., 189 So. 2d 731 (La. App. 1966).

See Green v. First National Bank of Tuskaloosa, 49 Ala. App. 426, 272 So. 2d 895, 901 (1971), *rev'd on other grounds*, 290 Ala. 14, 272 So. 2d 901 (1972); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson*, 48 Ala. App. 172, 263 So. 2d 149 (1972); *Putnam v. City of Huntsville*, 48 Ala. App. 33, 261 So. 2d 754 (1972). This prohibition is an extension of the general Alabama rule against new issues being presented on appeal. In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), this Court specifically recognized that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." [4]

Aetna argues nevertheless that its claims were properly presented because the Alabama courts have not in practice enforced the prohibition on late presentation of new claims. For example, although recognizing (Jurisdictional Statement at 15) that the Alabama courts have held that new issues cannot be raised on appeal, Aetna claims that the Alabama court's actual practice has been to the contrary. The two cases it cites, however, do not support its contention. In *King v. Reid*, 428 So. 2d 611 (Ala. 1983), the appellant sought on appeal to challenge the constitutionality of an Alabama statute under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court of Alabama held that "the record discloses that these issues were not presented to the court below, and thus review of them is foreclosed here." *Id.* at 615. In *Ex parte Hanna*, 267 Ala. 527, 103 So. 2d 720 (1958), since the appellant's constitutional argument was plainly without merit, the court found that it did not have to reach the procedural issue.

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[4] Aetna suggests that the Alabama practice should essentially be disregarded because it is not expressed in a formal rule or specifically directed to constitutional issues. Aetna cites no authority, nor supplies any argument, why the established practice of a state court should be regarded as any less controlling than a rule, or why Alabama must accord constitutional arguments a different procedural treatment than others.

Turning specifically to the procedure involving the Alabama affirmance statute, Aetna claims that since the penalty only is applied when a judgment is affirmed, it would not have been "logical" to challenge the statute before rehearing. Aetna cites *Central of Georgia Railway Co. v. Steed*, 287 Ala. 64, 248 So. 2d 110 (1979), and fifteen other cases in support of its argument.

Aetna cites no rule or practice of the Alabama court which indicates that arguments concerning the affirmance statute must await rehearing.[5] The Alabama courts have held that, assuming the conditions in the statute are met, the application of the penalty is a ministerial act. *See Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934). Aetna, therefore, had to have been aware that if the trial court's judgment were affirmed, the penalty would automatically attach, and Aetna's decision not to make its constitutional arguments in its briefs on appeal must be viewed as one of its own litigation strategy.

The cases cited by Aetna also do not establish that the practice it followed was proper. In eleven of the cited cases, the rehearing petition was filed by the appellee seeking to have the penalty awarded, rather than the appellant contending that its application was improper.[6]

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[5] Arguments concerning the application of the affirmance statute have been made in parties' main briefs and considered prior to rehearing. *See, e.g.*, Air Movers of America, Inc. v. State National Bank, 293 Ala. 312, 329, 302 So. 2d 517, 533 (1974); Cox v. Womack, 274 Ala. 1, 2-3, 145 So. 2d 201, 203 (1962).

[6] Brown Mechanical Contractors, Inc. v. Centennial Insurance Co., 431 So. 2d 932 (Ala. 1983); First Alabama Bank of Montgomery, N.A. v. Martin, 425 So. 2d 415 (Ala. 1982), *cert. denied*, 461 U.S. 938 (1983); Chapman v. Rivers Construction Co., 284 Ala. 633, 227 So. 2d 403 (1969); City of Troy v. McLendon, 279 Ala. 553, 188 So. 2d 281 (1966); Patterson v. Gains, 264 Ala. 184, 85 So. 2d 893 (1956); Lloyd v. Stewart, 258 Ala. 627, 64 So. 2d 884 (1953); Childress v. Younger, 258 Ala. 219, 61 So. 2d 808 (1952); Carter

In those cases, since the appellee was defending the judgment, it could assume the automatic application of the penalty upon affirmance. Only when the clerk did not add the statutory penalty was there any reason to argue the point, and thus rehearing was the first opportunity to raise the issue.[7]

Thus, in only four cases has the Alabama court considered on the merits an appellant's application for rehearing arguing that the affirmance penalty should be removed. In one case, the issue presented was one of first impression—whether the statute applied to cases under the Alabama court's certiorari jurisdiction. *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So. 2d 278 (1957). In *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174 (1950), the city raised the point—also one of first impression—that since it was not required to post a bond to appeal, it did not come within the terms of the statute. Only two of the cases cited by Aetna present a situation similar to the one at bar—a challenge by an appellant to the regular application of the affirmance statute first raised after the initial decision on appeal. In *Atlanta, Birmingham & Coast Railway Co. v. Cary*, 250 Ala. 675, 35 So. 2d 559 (1948), the appellant filed a motion to amend the judgment of affirmance, apparently arguing that the affirmance statute was unconstitutional. The motion was denied based on this Court's holding in *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261 (1916). And in *Central of Georgia Railway Co. v. Steed*, 287 Ala. 64, 248 So. 2d 110 (1979),

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v. Carter, 247 Ala. 209, 23 So. 2d 547 (1946); Snellings v. Builders' Supply Co., 229 Ala. 1, 155 So. 858 (1934); Dent v. Foy, 210 Ala. 160, 97 So. 627 (1923); New York Life Insurance Co. v. Reese, 201 Ala. 673, 79 So. 245 (1918).

[7] In Montgomery Light & Water Power Co. v. Thombs, 204 Ala. 678, 87 So. 205 (1920), the court originally affirmed the trial court, but on rehearing the case was remanded for further proceedings, and the court in connection with the rehearing on the merits noted that the affirmance statute did not apply.

a similar contention raised on rehearing was denied on the authority of *Atlanta, Birmingham.*

Contrary to Aetna, therefore, there has been no routine acceptance of arguments concerning the affirmance statute by appellants on rehearing. The fact that the Supreme Court of Alabama has proceeded to consider such arguments in a few cases does not permit invocation of this Court's jurisdiction where the federal argument was not considered below. In *Orr v. Orr*, 440 U.S. 268 (1979), also an appeal involving the constitutionality of an Alabama statute, the constitutional claim was first presented on appeal, but was considered by the Alabama court without objection. This Court noted that:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

Id. at 274. Since the constitutional argument was considered below, jurisdiction was established. However, the Court noted that its conclusion "does not preclude any other State, *or even Alabama in another case,*" from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275 n.4 (emphasis added). That is the case here. The fact that the Alabama court declined to enforce its prohibition of new arguments on rehearing in one case in almost thirty years does not excuse Aetna from its tardiness. Since the matter was neither properly raised nor considered by the Supreme Court of Alabama, this Court has no jurisdiction to consider Aetna's appeal challenging the Alabama affirmance statute.

B. The Constitutional Issues Concerning Justice Embry Are Not Properly Before This Court

Aetna's contentions regarding the participation of Justice Embry and the other justices of the Supreme Court

of Alabama [8] were neither presented prior to the decision of the Alabama court nor in Aetna's application for rehearing. They were instead first raised in a motion to disqualify filed on February 21, 1985, and pressed again in a second application for rehearing on March 22, 1985.[9] The motion was denied on March 8, 1985 (App. 64a-73a) and the second application was summarily denied on March 25, 1985 (App. 74a-75a).

The motion was denied on the basis of each justice's individual decision that he was not disqualified (App. 64a). There was no mention of the constitutional argument in either the court's per curiam order or in the two concurring opinions (App. 64a-73a). Aetna contends (Jurisdictional Statement at 10) that its claim is properly before this Court because the Alabama court decided "a procedural aspect of appellant's disqualification challenge, *i.e.*, whether an individual Justice should or would pass on the qualifications of the other individual Justices . . ." and Aetna's substantive claim that the five justices who joined in the court's opinion were disqualified. These arguments distort what actually occurred below and do not demonstrate that this Court has jurisdiction to consider Aetna's constitutional argument concerning Justice Embry.

Aetna's brief in support of its motion to disqualify did not at any point suggest what procedure the Alabama

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[8] Although Aetna argued to the Alabama court that all of its members were tainted by their participation, *inter alia*, in the decision with Justice Embry (Brief in Support of Motion for Disqualification, Aetna Life Insurance Co. v. Lavoie, Ala. S. Ct. No. 82-426 (Feb. 21, 1985) at 5-7), it apparently has abandoned its argument with respect to the members of the Alabama court other than Justice Embry. Jurisdictional Statement at 9 n.2.

[9] Under Alabama procedure, it would appear that these were either attempts to broaden Aetna's application for rehearing long after the expiration of the time limits in Ala. R. App. P. 40, or to file a second application for rehearing which is prohibited unless the court first modifies its original action. *Id.*

court should follow in deciding whether its members were disqualified. The relief sought was disqualification of Justice Embry and of the remaining justices, and withdrawal of the court's opinion. Nothing was said about whether these decisions should be made individually or collectively. Aetna simply has no basis for claiming that the procedure the Supreme Court of Alabama chose to employ in any way represented a decision on Aetna's federal claim.

Further, there is no indication that any of the justices considered Aetna's constitutional argument, which rested on an assumed conclusion that the justices were biased. The decision denying the motion appears to rest on the ground that the members of the court, applying Alabama standards of judicial conduct, found that they were not disqualified from hearing Aetna's appeal. In these circumstances, where there was an implicit finding of no improper bias, there would have been no reason for the court to go on to consider an argument that the federal Constitution required disqualification. Contrary to Aetna's argument, therefore, the denial of Aetna's motion to disqualify did not represent a decision on Aetna's federal claim.[10]

Aetna argues, however, that even if its constitutional argument was not addressed by the Alabama Supreme Court, the argument was properly presented and is within this Court's jurisdiction. There is no merit to this argument for, as noted above, Aetna did not raise this claim until well after its application for rehearing and utilized a procedure which is outside the scope of the Alabama Rules of Appellate Procedure.

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[10] As the Court recognized in *Exxon*, when the highest state court does not address a federal question, it will be assumed that the omission was due to improper presentation, unless affirmatively shown to the contrary. 462 U.S. at 181 n.3; *see* Street v. New York, 394 U.S. 576, 582 (1969).

Further, while Aetna claimed that the facts upon which its claim was based were newly discovered, it made no effort to establish why it could not have discovered the relevant facts before more than a year had passed since the filing of the two suits by Justice Embry. Aetna's motion, which sought a new hearing on the basis of newly discovered evidence, is analogous to a motion for a new trial under Ala. R. Civ. P. 60 or Fed. R. Civ. P. 60. It is the burden of those seeking a new trial to demonstrate why through "due diligence" the evidence relied on could not have been discovered earlier. *Gallups v. United States Steel Corp.*, 353 So. 2d 1169 (Ala. Civ. App. 1978); *see Valmont Industries, Inc. v. Enresco, Inc.*, 446 F.2d 1193 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); *see also Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 361-62 (1963). Since Aetna did not offer any explanation of the circumstances of its discovery, by a parity of reasoning, Aetna cannot maintain that its federal claim was properly presented. Thus, like Aetna's arguments concerning the affirmance statute, its constitutional arguments arising out of Justice Embry's participation in the Supreme Court of Alabama's decision were not timely presented to nor decided by the Alabama court, and cannot be considered by this Court.

C. The Contract Clause and Eighth Amendment Issues Were Not Timely Raised

Aetna first mentioned a claim under the Eighth Amendment in its application for rehearing. Its Contract Clause argument was not presented until its motion for disqualification on February 21, 1985.[11] Neither argument

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[11] Aetna contends (Jurisdictional Statement at 13) that the Contract Clause argument could have been deduced from the Eighth Amendment and Due Process arguments in the brief supporting its first application for rehearing. The Alabama courts, however, will not consider arguments for which no authority is cited. *See* DeGraaf v. State, 34 Ala. App. 137, 144, 37 So. 2d 130,

was considered by the Supreme Court of Alabama. For the same reasons which apply to Aetna's argument concerning the Alabama affirmance statute, these arguments were not timely raised and, therefore, are not within this Court's jurisdiction.[12]

Aetna claims that its late presentation should be excused under the doctrine of *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff* and the cases following it, the Court has held that late-presented federal issues may be considered when they arise as the result of an unexpected and unanticipated holding by the state court. In *Brinkerhoff*, the Supreme Court of Missouri held that the petitioners were guilty of laches for failing to take advantage of an administrative remedy, overruling the same court's previous decision that the administrative remedy did not exist. The petitioners on rehearing for the first time argued that the retroactive application of this holding denied them due process, and Justice Brandeis, writing for this Court, held that the federal issue was timely presented because there could have been no earlier opportunity to raise it. The unexpected decision thus was directly related to the issue subsequently raised.[13]

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137 (1948); *see also* CIO v. McAdory, 325 U.S. 472, 477 (1945). Since the Contract Clause was not mentioned in Aetna's brief on rehearing, there can be no contention that Aetna then properly presented the issue, particularly since, as Aetna concedes (Jurisdictional Statement at 18), the application of the Contract Clause it espouses is unprecedented.

[12] This is particularly the case with Aetna's Contract Clause argument. Ala. R. App. P. 40 provides that "[n]o second application for rehearing will be considered unless the rehearing reversed or substantially modified the original opinion of the court." The issues raised for the first time in the motion for disqualification, therefore, were specifically barred from consideration by the Alabama rules.

[13] Similarly, in PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-86 n.9 (1980), an argument first presented on appeal to the

Aetna's arguments in this case, however, do not fall within this exception. The Supreme Court of Alabama here affirmed the judgment of the trial court. And while Aetna contends that it was surprised by certain aspects of the Supreme Court's decision, it does not explain how the rationale employed by the Supreme Court for the first time created an opportunity to argue that the Eighth Amendment and the Contract Clause had been offended. Both the fact of a judgment against Aetna on a tort claim and the size of the punitive damages award were fully evident when Aetna filed its brief on appeal and were not significantly changed by the Alabama Supreme Court's decision. Thus, Aetna's reliance on *Brinkerhoff* is misplaced and its claims under the Eighth Amendment and the Contract Clause are not properly before this Court.

D. Prudential Considerations Dictate Dismissal of this Appeal

Finally, Aetna argues that despite its failure to timely raise its constitutional arguments before the Alabama courts, this Court may review the decision of the Supreme Court of Alabama because the prudential considerations which normally dictate that the Court not review questions on which the state court has not passed are inapplicable. To the contrary, the purposes which have been identified as supporting the rule against hearing issues not presented and considered are fully applicable in the instant case, and support dismissal.[14]

California Supreme Court was deemed timely because in the lower courts the appellants had relied on a California decision which was subsequently overruled.

[14] Further, while Aetna assumes that the rule is not jurisdictional (Jurisdictional Statement at 14), this Court's decisions leave the matter in doubt. *Compare* Wood v. Georgia, 450 U.S. 261 (1981), *with* State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945), *and* Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836); *see generally* Illinois v. Gates, 462 U.S. 213, 218-19 (1983).

Aetna argues that its Eighth Amendment and Contract Clause claims should be deemed timely because, if its arguments with respect to Justice Embry are well taken, it never had an opportunity to present its claims, and further, that since it believes the Court has jurisdiction over its first two federal claims, there is no reason not to consider other claims even if not timely presented below. These arguments entirely rest on a key but erroneous assumption—that Aetna's first two arguments were timely raised. Further, it is simply absurd to contend that the alleged bias of Justice Embry—of which Aetna claims it was unaware when it prepared its brief in the Alabama court—justifies Aetna's failure timely to make its constitutional arguments.

A "due regard for appropriate relationship of this Court to state courts," [15] dictates that Aetna's appeal be dismissed. In this case, Aetna challenges obligations which the Alabama courts have found apply to insurance companies. The Alabama court is entitled to an opportunity to decide whether its decisions are constitutional and explain its reasons prior to review by this Court. Since the underlying cause of action here is one wholly of state law, this Court should not intrude without a full explication of the state court's determination, an explication that is absent from the present record.

Further, contrary to Aetna's contentions, the facts relevant to a decision by this Court are not established. Aetna's claim that Justice Embry should have been disqualified is based entirely on the submissions made by Aetna in its two motions. There was no opportunity below for exploration of the extent of any overlap between the issues in the present case and the two suits filed by Justice Embry, or determination of the precise posture of the cases in which Justice Embry was in-

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[15] McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940).

volved. As the Court recognized in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), the record in this Court is likely to be inadequate on questions which were not raised below.

In *Webb v. Webb*, 451 U.S. 493, 499 (1981), the Court emphasized:

> "that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below."

This principle fully applies in this case and the Jurisdictional Statement should be dismissed.

II. THE FEDERAL QUESTIONS ARE NOT SUBSTANTIAL

Assuming, *arguendo*, that the issues presented by Aetna are properly before this Court, the appeal should nonetheless be dismissed for want of a substantial federal question. The decision of the Supreme Court of Alabama affirmed a judgment against Aetna for violating a state-created duty to treat its insureds fairly and did so on the basis of evidence of extraordinarily egregious conduct by Aetna. The recognition of a duty between an insurer and its insureds, and the application of that duty to the circumstances of a particular case, are matters totally of state law. The arguments now pressed by Aetna are merely an effort to have this Court intrude itself into the development of Alabama tort law. That they are peripheral to the issues in the case is indicated by the fact that Aetna never sought to raise them until the last moment before seeking this Court's review. The four issues are insubstantial and the appeal should therefore be dismissed.

A. The Alabama Affirmance Statute Does Not Violate the Equal Protection Clause of the Fourteenth Amendment

Ala. Code section 12-22-72 provides for the assessment of ten percent damages against an appellant if a money judgment is affirmed on appeal. Aetna contends that this statute contravenes the Equal Protection Clause of the Fourteenth Amendment because it overinclusively discourages meritorious appeals and underinclusively applies only to defendant-appellants. However, because no suspect class or fundamental right is involved, the statute will withstand an equal protection challenge if it is rationally related to furthering a legitimate state objective. *See Lindsey v. Normet*, 405 U.S. 56, 78 (1972). (1979). This Court has indicated that it "will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [it] can only conclude that the legislature's actions were irrational." 440 U.S. at 97.

In enacting section 12-22-72, the Alabama legislature intended to discourage frivolous and dilatory appeals. *Chapman v. Rivers Construction Co.*, 284 Ala. 633, 227 So. 2d 403, 415 (1969). Such a legislative purpose has been recognized by this Court as a legitimate state objective. *See Lindsey v. Normet*, 405 U.S. 56, 78 (1972). The inquiry, then, is whether this statutory scheme is "reasonably tailored to achieve these ends and [whether it is] uniformly and nondiscriminatively applied." *Id.* at 78.

Unlike the statute at issue in *Lindsey* which arbitrarily imposed a double-bond requirement only on tenant defendant-appellants, section 12-22-72 applies to *all* appellants having money judgments entered against them in the trial below. The class of appellants is not restricted to defendants, but includes a plaintiff who has had judgment entered against it on a counterclaim. The rationale behind such a classification is readily apparent—an un-

successful litigant facing payment of a money judgment will tend to protract the litigation process as long as possible so that he may benefit from the funds rightfully owing to the other party. Plaintiffs who do not receive a judgment at trial do not have a similar interest in prolonging litigation. Section 12-22-72 discourages frivolous appeals intended for delay and makes no arbitrary classification between similarly situated persons unrelated to the reasonable objectives of the statute.

In *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174 (1950), the court indicated another purpose for the statute—"to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered." *Id.* at 47, 47 So. 2d at 180. As this Court recognized in *Lindsey*, Alabama is not required to provide any appellate review, 405 U.S. at 77, and therefore may condition availability of the right to an appeal. In *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261 (1916), Justice Holmes, writing for the Court, considering an attack on a statute similar to Alabama's, held that "[t]here was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld." The provision of additional damages to those who have had satisfaction of their judgments delayed is a rational objective which supports the Alabama statute.

Aetna's reliance on *Lindsey v. Normet* is misplaced. The statute in *Lindsey* placed an impediment on a group —tenants—which was the least likely to be able to meet it. 405 U.S. at 79. No similar contention could be made about a penalty which applies to those against whom a money judgment has been awarded. Further, all of the interests which the statute identified in *Lindsey* as the reasons for the double-bond requirement were fully satisfied by other requirements in the Oregon statute. Aetna

has not argued that section 12-22-72 is improperly duplicative of other protections created by Alabama. Thus, Aetna's contention that the affirmance statute presents a substantial question of constitutional dimensions is clearly without merit.

B. The Failure of Justice Embry to Disqualify Himself Raises No Substantial Due Process Question

The issue of disqualification presented by Aetna is not of a constitutional magnitude. This appeal does not involve a criminal defendant's Sixth and Fourteenth Amendment right to a fair trial, *e.g.*, *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *In re Murchison*, 349 U.S. 133 (1955), nor does it involve a statutory scheme which is challenged as creating an unconstitutional risk of basis in the adjudicator. *E.g.*, *Withrow v. Larkin*, 421 U.S. 35 (1975); *Gibson v. Berryhill*, 411 U.S. 564 (1973). Indeed, Aetna does not assert that Alabama appellate procedure operates to violate its due process rights or that the Alabama Canons of Judicial Ethics are regularly and systematically interpreted to permit justices of the Alabama Supreme Court to participate in cases in which they have a substantial interest. Rather, Aetna's sole complaint is that one particular justice on a nine-member appellate court failed to disqualify himself from participating in a single case.

There is no evidence that Justice Embry was not capable of judging this particular controversy on the basis of its own circumstances, or that his participation constituted a clear violation of the Alabama Canons of Judicial Ethics. Under the Alabama Canons of Judicial Ethics, disqualification was not mandatory, but was committed to the sound discretion of Justice Embry. Ala. Canons of Judicial Ethics 3C(1). Justice Embry exhibited no personal bias against Aetna or in favor of the Lavoies. He merely expressed his view that an insurance company should not be able to deny claims in bad faith with impunity. Such prior expression of opinion on is-

sues of policy and law have never formed a sufficient predicate for disqualification, either on statutory or on constitutional grounds. *See Laird v. Tatum*, 409 U.S. 824 (1972); *FTC v. Cement Institute*, 333 U.S. 683, 703-04 (1948). At most, Aetna presents a question of the proper interpretation of the Alabama Canons of Judicial Ethics, a matter peculiarly within the province of the Alabama Supreme Court, and which raises no substantial constitutional question.

The situation in *Berger v. United States*, 255 U.S. 22 (1921), relied on by Aetna (Jurisdictional Statement at 23), is inapposite. *Berger* involved the application of a statute which required recusal once certain affidavits and certificates were filed. This Court's holding was that there was no discretion once the statutory requirements were met and that the recusal decision did not depend upon an evaluation of the contents of the affidavit. Aetna's claims concerning Justice Embry arise in a far different circumstance where there is no provision for automatic disqualification.

Further, the factual predicate for Aetna's contention—that Justice Embry voted against the insurer because of his own personal interests—is belied by his voting record in similar cases during the same period. The first suit complained of by Aetna was filed by Justice Embry on November 23, 1983. Since that date, Justice Embry has participated in twelve decisions involving alleged bad faith denials of insurance claims. In nine of those cases —all of which were decided while Justice Embry was litigating a claim of bad faith against an insurer—Justice Embry voted for the insurer. For example, in *Bowers v. State Farm Mutual Automobile Insurance Co.*, 460 So. 2d 1288 (Ala. 1984), decided one week before the decision in the case at bar, Justice Embry concurred in an opinion affirming summary judgment in favor of the insurer. In *Watkins v. Life Insurance Co. of Georgia*, 456 So. 2d 259 (Ala. 1984), Justice Embry again concurred in a decision holding that the tort of bad faith

did not extend to the wrongful cancellation of insurance policies. *See also Payne v. Nationwide Mutual Insurance Co.*, 456 So. 2d 34 (Ala. 1984); *Armstrong v. Life Insurance Co. of Virginia*, 454 So. 2d 1377 (Ala. 1984); *National Security Fire & Casualty Co. v. Vintson*, 454 So. 2d 942 (Ala. 1984); *Gibson v. Fidelity & Casualty Co. of New York*, 454 So. 2d 526 (Ala. 1984); *Stewart v. State Farm Insurance Co.*, 454 So. 2d 513 (Ala. 1984) (opinion by Embry, J.); *Dickey v. Alabama Farm Bureau*, 447 So. 2d 693 (Ala. 1984); *Garvin v. Shewbart*, 442 So. 2d 80 (Ala. 1983).

Obviously, this voting record contradicts Aetna's conclusion that Justice Embry's filing of two suits improperly prejudiced him against the insurer. In these circumstances, the judgment of the Justices of the Supreme Court of Alabama that Justice Embry's participation in the decision in this case did not require either his or their disqualification does not raise a substantial federal question warranting this Court's review.

C. The Alabama Decisions Do Not Unconstitutionally Impair Aetna's Contractual Obligations

Aetna argues that Alabama's imposition of tort liability for bad faith in handling insurance claims violates the Contract Clause, U.S. Const. art. I, § 10, since it contends that the court's decision retroactively altered Aetna's contractual obligations. Specifically, the Alabama decision purportedly "has added the substantive obligations articulated in 1981 in *Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1 (Ala. 1981), upon pain of the infliction of substantial, arbitrary and unpredictable punitive damages." Jurisdictional Statement at 24.

The Contract Clause provides that "No State shall . . . *pass any* . . . *Law* impairing the Obligations of Contracts." U.S. Const. art. I, § 10., cl. 1 (emphasis added). From the very language of the Clause, it is clear that the framers specifically intended to prohibit only state *legislative* acts "which altered the obligations of contracts by

effectively relieving one party of the obligation to perform a contract duty." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 257 (1978) (Brennan, J., dissenting). This Court and other courts have uniformly and repeatedly held that the prohibition set forth in the Contract Clause is directed against impairment by legislative action only, and not by the judicial action of state courts. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924); *Frazier v. Lowndes County Board of Education*, 710 F.2d 1097, 1099 (5th Cir. 1983); *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 859 (3d Cir. 1975); *Propst v. Board of Educational Lands and Funds*, 103 F. Supp. 457, 460 (D. Neb. 1951), *appeal dismissed*, 343 U.S. 901 (1952); L. Tribe, *American Constitutional Law* § 9-5 at 465 n.1 (1978).[16]

Aetna's contention (Jurisdictional Statement at 26-27) that this question was left unresolved in *Tidal Oil* is incorrect. The Court's direct holding was that "[i]t has been settled by a long long of decisions, that the [Contract Clause] is directed only against impairment by legislation and not by judgments of courts." 263 U.S. at 451 (footnote omitted). Thus, there can be no doubt that the actions of Alabama's courts are not within the ambit of the Contract Clause.

Aetna argues, however, that the Court should disregard this long line of unbroken precedent in light of what Aetna regards as 'the simple fortuitous circumstance that [Alabama's] judicial branch, rather than its

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[16] Aetna also takes a leap of logic in suggesting that the Court's refusal to entertain its Contract Clause challenge would threaten the vitality of First Amendment protections against defamation actions. In Barrows v. Jackson, 346 U.S. 249 (1953), while specifically recognizing that judicial action could constitute "state action" violative of the Equal Protection Clause of the Fourteenth Amendment, the Court specifically rejected any suggestion that such court action could also impair contractual obligations in violation of the Contract Clause. 346 U.S. at 260.

legislative branch, legislated this drastic change in the legal rules governing appellant's contractual relationships with its insureds in Alabama." Jurisdictional Statement at 26. Aetna relies heavily on the Court's decision in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), to support its assertion that a drastic change in legal rules may violate the Contract Clause, irrespective of which branch of state government created the particular rule.[17]

The fundamental premise of Aetna's argument—that the Alabama decisions recognizing the tort of bad faith denial of insurance claims interfere with its *contractual* relationships—is flawed. The Alabama decisions, unlike the statute in *Spannaus*, do not alter the terms of the contracts between Aetna and its insureds, or increase Aetna's liability under those contracts. Instead, they recognize a duty of good faith in dealing with claimants independent of the obligations created by the contract. While the relationship between the parties may be one that was formed under a contractual arrangement, Alabama is free to recognize the duties that arise from that relationship without violating the Contract Clause. Numerous decisions have imposed upon parties to a contract duties beyond their expectations at the time they originally entered into the transaction.[18] Yet no court has held that the recognition of such tort liability offends the Constitution.

Moreover, the Alabama decisions are in line with numerous other states in imposing a duty of good faith on insurers. *See, e.g., Noble v. National American Life*

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[17] In *Spannaus*, the Minnesota legislature imposed pension obligations on employers that had not been agreed to at the time of the creation of the pension plan. 438 U.S. at 238-39. The *Spannaus* Court, of course, did not make any reference to the treatment of judicial decisions, since it was reviewing a legislative act.

[18] *See, e.g.*, Caldwell v. Bechtel, Inc., 631 F.2d 989 (D.C. Cir. 1980); McPherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E. 1050 (1916).

Insurance Co., 128 Ariz. 188, 624 P.2d 866 (1981); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal. App. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979); *Gruenberg v. Aetna Life Insurance Co.*, 9 Cal. App. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973); *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978).[19]

The Alabama decisions, therefore, do not present a substantial question of federal law.

D. The Punitive Damage Award Raises No Substantial Federal Question under the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment

Aetna challenges the punitive damage award on two other constitutional grounds. It argues that the amount of the award presents a substantial federal question under the Excessive Fines Clause of the Eighth Amendment, as applied to the States under the Due Process Clause of the Fourteenth Amendment, or alternatively, under the Due Process Clause directly.[20]

The question Aetna has raised based on the Eighth Amendment is, as Aetna itself concedes, one of first impression in this Court. Jurisdictional Statement at 29.

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[19] Aetna's assertions that Alabama's recognition of the tort of bad faith was a "drastic change" and "unanticipated" do not ring true. In Vincent v. Blue Cross-Blue Shield of Alabama, Inc., 373 So. 2d 1054 (Ala. 1979), the Alabama court emphasized that it had up to that point neither recognized nor rejected the tort of bad faith denial of insurance claims.

[20] Aetna provides little support for its argument that a substantial federal question is raised directly through the Due Process Clause with respect to the purported disproportionality of the punitive damages award affirmed by the Alabama Supreme Court. Although some states appear to require that punitive damages bear some commensurate relation to the amount of an award of compensatory damages, other states have rejected such a requirement. *See generally*, D. Dobbs, *Remedies* § 3.9 (1973).

In order to arrive at the unprecedented result advocated by Aetna, however, this Court would be required to make substantial leaps of logic and precedent. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The plain language of the Amendment, the historical background preceding its ratification, and judicial interpretations all lead to the conclusion that the framers intended the Amendment to place limitations only on the conduct of criminal proceedings. *See Solem v. Helm*, 103 S. Ct. 3006 (1983); *Ingraham v. Wright*, 430 U.S. 650, 664-66 (1977). Indeed, this Court stated more than 150 years ago in considering a challenge under the Excessive Fines Clause, that, "the eighth amendment is addressed to courts of the United States exercising *criminal* jurisdiction". *Ex parte Watkins*, 32 U.S. (7 Pet.) 357 (1833) (emphasis added). To adopt the unprecedented view that punitive damages awarded in a private civil action might constitute excessive fines in violation of the Eighth Amendment would be an unwarranted distortion and expansion of the plain meaning of the Amendment. *See Ingraham v. Wright*, 430 U.S. at 667-68.[21]

Moreover, despite Aetna's unsupported suggestion that this Court held the Eighth Amendment *in toto* applicable to the States through the Due Process Clause of the Fourteenth Amendment, it is by no means evident that

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[21] Aetna's reference to Justice Brandeis' statement in dissent in Milwaukee Publishing Co. v. Burleson, 255 U.S. 407, 435 (1921), is misdirected. *Burleson* involved an enforcement action instituted by the Postmaster General upon charges that the newspaper's articles violated provisions of the Espionage Act (40 Stat. 217). 255 U.S. at 408-09. Thus, Justice Brandeis' statements were made in the context of a quasi-criminal proceeding, rather than a private civil suit, and would be of questionable applicability to the issue Aetna has framed, particularly in light of more recent decisions of the Court with respect to the Cruel and Unusual Punishments Clause. Ingraham v. Wright, 430 U.S. 650 (1977); Uphaus v. Wyman, 360 U.S. 72, 82 (1958).

the Court has ever incorporated any clause other than the Cruel and Unusual Punishment Clause in the Fourteenth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962). There is nothing in *Furman v. Georgia*, 408 U.S. 238 (1972), that applies the Excessive Fines Clause to the states. The present case would be particularly inappropriate to address this question in view of the fact that no criminal proceeding is involved. Thus, the imposition of punitive damages on Aetna poses no substantial question of federal law.

CONCLUSION

For the foregoing reasons, the appeal in this case should be dismissed.

Respectfully submitted,

JACK N. GOODMAN *
JOHN A. RITCHIE
ELIZABETH A. FERRELL
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE, CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

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No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal From the Supreme Court of Alabama

REPLY MEMORANDUM

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*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Of Counsel:

PETER V. SINTZ
WILLIAM M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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American Banker, May 10, 1985, at 1, col. 3 10

REPLY MEMORANDUM

Because appellees' Motion to Dismiss (hereafter "Motion") advances arguments which were generally anticipated in appellant's Jurisdictional Statement (hereafter "Juris. Stat."), this Reply Memorandum will respond primarily to various mischaracterizations by appellees of fact, law, and appellant's position in this appeal.[1]

I. JURISDICTION

Appellees' arguments regarding this Court's jurisdiction to decide this case proceed from the inaccurate assumption that "[i]t is a fundamental prerequisite of this Court's jurisdiction over a decision from a state court that the issues sought [sic] under federal law have been presented to *and* decided by the highest state court." Motion, at 4

[1] Although the selected "facts" recited by appellees, Motion, at 1-3, on which the Alabama courts assertedly "based their decisions," Motion, at 1, are essentially irrelevant to the constitutional questions presented by this appeal and serve only to focus attention away from the legal issues, four observations are in order regarding their presentation by appellees. First, they are "findings" made not by the jury or trier of fact, but are summaries of selected evidence authored by the Justice of the Supreme Court of Alabama whose bias and personal interest in the outcome of this case is challenged by appellant. Second, if appellees' assertion were true that these "facts" "represent the unanimous holding of the Supreme Court of Alabama," *id.*, at n.1, because not disputed by the four dissenting Justices of that court, then presumably those four Justices dissented on the basis that the majority had rewritten the Alabama *law* of bad faith failure to pay an insurance claim. Third, appellees' statement of the facts conveniently ignores the undeniable fact that appellee Margaret W. Lavoie was hospitalized a total of twenty-three days, but received a discharge diagnosis of "osteoarthritis, mild psychophysiologic reaction manifested by abdominal pain." App. A, at 4a. Fourth, appellees seem to embrace the apparent position of the majority of the court below that the $3,500,000 punitive damage award can be sustained by the manner in which this case was presented to the jury. Motion, at 3. This position, if nothing else, demonstrates the essentially irrational nature of punitive damages that is challenged in Question 4 of this appeal.

(emphasis added). For this erroneous proposition appellees rely, *inter alia*, on this Court's decision in *Illinois* v. *Gates*, 462 U.S. 213 (1983). But, as previously pointed out by appellant, Juris. Stat., at 8, this Court restated in *Illinois* v. *Gates*, 462 U.S., at 218 n.1, the familiar rule that a federal question must have been "*either* raised or squarely considered and resolved in state court." Application of this Court's rule, rather than the standard created by appellees, establishes this Court's jurisdiction over this appeal.

A. Presentation of the Disqualification Question

Appellees argue that the issue of Justice Embry's misconduct may not be reached by this Court because appellant did not discover the underlying facts and raise its federal constitutional challenge sooner. They state that appellant "made no effort to establish why it could not have discovered the relevant facts before more than a year had passed since the filing of the two suits by Justice Embry." Motion, at 13. Appellees do not, however, suggest what actions appellant could or should have taken to "discover" the facts establishing Justice Embry's constitutional unfitness to decide this case. Surely appellees cannot be urging a rule whereby, in order to preserve a possible constitutional challenge, litigants must probe into the private lives of the jurists before whom they appear to discover interests which may cause a judge to be biased or which may create the strong appearance of bias. Nor do appellees explain what justification there might have been for Justice Embry's not making this obvious conflict known to the parties or to his fellow Justices who had been made putative members of the class in his bad faith action against Blue Cross. Appellees implicitly urge a rule under which litigants would be under a continuing duty to monitor the dockets of every court in a state in order to identify litigation brought by judges before whom they appear which might disqualify a judge from hearing their cases. Appellees also conveniently ignore the fact that very damaging evidence of Justice Embry's misconduct is contained in his deposition, which

was not even in existence until January 10, 1985 and which, despite its best efforts, appellant was unable to secure until March 20, 1985.[2]

Finally, appellees seem to argue that appellant had a duty to "suggest" in its initial disqualification motion "what procedure the Alabama court should follow in deciding whether its members were disqualified." Motion, at 11-12. The source of this duty or its ramifications are not revealed and appellees' point, if they have one, is obscure. Appellant squarely placed this issue before the Supreme Court of Alabama and demanded that Justice Embry and any members of his putative class be disqualified and this case reheard. In support of its March 22, 1985 disqualification motion, appellant specifically objected to the decision of each Justice below (save Justice Embry) in refusing to pass on Justice Embry's constitutional qualifications to hear and decide appellant's case. App. G, at 274a-275a. Appellant could have done no more.

B. Presentation of the § 12-22-72 Question

The total lack of any clear, consistent rule of practice in the Supreme Court of Alabama as to when it will or will not decide a question not previously presented is illustrated by appellees' statement, supported by citation to a single case of the court below, *Kirkland* v. *Kirkland,* 281 Ala. 42, 198 So.2d 771 (1967), Motion, at 6, that "Alabama procedure does not permit parties to raise new questions on rehearing . . . ," as contrasted with the actual practice of that court with respect to entertaining *new* questions expressly involving interpretation of § 12-22-72 in no fewer than seven-

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[2] Appellees state that appellant "did not offer any explanation of the circumstances of its discovery" of Justice Embry's misconduct. Motion, at 13. In fact, appellant fully explained those circumstances in three affidavits filed in connection with its February 21, 1985 disqualification motion, App. F, at 105a-107a, 130a-131a, and two additional affidavits and one exhibit detailing its efforts to secure the transcript of Justice Embry's deposition, App. G, at 137a-144a.

teen cases dating from 1861 [3] on applications for rehearing or their procedural equivalents.

It must be emphasized that § 12-22-72 imposes a liability at the time the judgment below is affirmed. An appellant has no liability for the penalty before affirmance. No case in the Supreme Court of Alabama of which we are aware so much as suggests that any question involving §12-22-72 is not timely presented in an application for rehearing, and appellees point to none.

In addition, a careful reading of the opinion in *Kirkland*, the case relied upon by appellees, shows that in that case the court rendered its opinion on the question presented for the first time in that application notwithstanding the disclaimer that it could not do so. 281 Ala., at 49, 198 So.2d, at 777. This obvious gap between rhetoric and practice is illustrated once again by the court's decision in *Ex parte Hanna*, 267 Ala. 527, 103 So.2d 720 (1958), a case relied upon by appellant, Juris. Stat., at 15. In that case, the petitioners sought to challenge the constitutionality of two statutes and the respondent contended that the challenge was improperly raised. Rather than rejecting those challenges as untimely, the court reached and decided the constitutionality of one of those statutes. Appellees explain the basis for the *Hanna* court's decision by reasoning that, "since the appellant's constitutional argument was plainly without merit, the [Supreme Court of Alabama] found that it did not have to reach the procedural issue." Appellees apparently by this reasoning would try to convince this

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[3] Subsequent to docketing this appeal, appellant discovered a case, in addition to the sixteen cases previously documented, Juris. Stat., at 12-13 & n.5, in which the court below heard and determined a challenge to the interpretation of a predecessor of § 12-22-72 which was not even raised in an application for rehearing but was raised for the first time in the trial court after remand by the Supreme Court of Alabama. *Lawrence* v. *Jones*, 37 Ala. 388 (1861). Appellees' argument that some of these cases may be distinguished, Motion, at 8-9, because they involve questions regarding § 12-22-72 which were raised by appellees rather than appellants is a distinction without any significance as to when a party must raise questions concerning § 12-22-72 in order to be heard.

Court that the rule in Alabama is that frivolous federal constitutional questions may be presented at any time and will be decided, but substantial federal constitutional questions are strictly governed by an unarticulated procedure under which they will not be decided.

Appellees' attempt to dismiss *King* v. *Reid*, 428 So.2d 611 (Ala. 1983), is misleading. Appellees quote from *King*, Motion, at 7, the disclaimer—already brought to the attention of this Court by appellant, Juris. Stat., at 15—found in *King* and some other cases of the court below that it will not decide issues which have not been presented to the lower state courts. Appellees fail to quote the preceding sentence in *King:*

> "*Ransom v. Ransom*, Ala., 401 So.2d 746 (1981), and a casual reading of the present language of § 6-10-60, et seq., dispose of the attack on those statutes."

Id., at 615. Because the Supreme Court of Alabama is without power to issue advisory opinions, *e.g.*, *Opinion of the Justices No. 304*, 436 So.2d 832, 833 (Ala. 1983), the *holding* of *King* v. *Reid* is necessarily found in the sentence quoted above. The rule in the Supreme Court of Alabama on this issue is plainly that it has no rule,[4] or at least that it has no rule that is susceptible to being invoked against appellant in this case.

C. Presentation of the Contract Clause Question

Appellees concede, Motion, at 15 n.14, that "this Court's decisions leave . . . in doubt" the question whether the mode

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[4] The case of *Orr* v. *Orr*, 440 U.S. 268 (1979), relied upon by appellees, Motion, at 10, is another case illustrative of the actual practice of the court below. And this Court, in taking jurisdiction over and vacating the decision of the court below in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), *writ dismissed*, 362 So.2d 918 (Ala. 1978), *vacated*, 441 U.S. 901 (1979), necessarily decided that the court below had no consistent practice because the Court of Civil Appeals had *expressly* refused to decide the constitutional question presented to it because that question had not been presented to the lower court, *Hughes* v. *Hughes*, 362 So.2d, at 916, and the Supreme Court of Alabama had dismissed a petition for a writ of certiorari without disturbing that holding of the Court of Civil Appeals.

of presentation of a federal question to the state courts raises jurisdictional or only prudential concerns. This concession, of course, does not go far enough. Until this Court repudiates its *power* to decide federal questions which were at *no* time presented to the state courts below or even to this Court, *see, e.g., Vachon* v. *New Hampshire,* 414 U.S. 478 (1974), the only permissible reading of this Court's cases is that the presentation of federal questions to the state courts raises only prudential concerns where at least one properly presented or decided federal question confers jurisdiction over the case before the Court.

D. Presentation of the Excessive Fine Clause and Due Process Clause Question

Appellant has argued that it was justifiably surprised by the affirmance of the judgment by the court below so as to entitle it to raise the doctrine of "surprise" established in cases such as *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U.S. 673 (1930). Juris. Stat., at 16. Surely the five-to-four affirmance of the judgment below based on the highly interested vote of Justice Embry in an opinion overturning or substantially modifying pertinent Alabama law constitutes the requisite "surprise" for purposes of presentation of this question (and the Contract Clause question) for decision by this Court. If not, the *Brinkerhoff-Faris* doctrine can have little or no practical application.

II. THE SUBSTANTIALITY OF THE FOUR QUESTIONS

A. The § 12-22-72 Question

Appellees' defense of the constitutionality of § 12-22-72 seems to be based primarily on their suggestion that *Lindsey* v. *Normet,* 405 U.S. 56 (1972), is distinguishable because the Oregon statute struck down in *Lindsey* "placed an impediment on a group—tenants—which was the least likely to be able to meet it." Motion, at 19. Appellees' argument would necessarily require *Lindsey* to be read as establishing "tenants" as a suspect class for purposes of the Equal Protection Clause. The *Lindsey* Court, of course, did

no such thing. The discriminatory, overly broad and arbitrary barrier to access to the courts is the evil condemned in *Lindsey,* Juris. Stat., at 20, and is precisely the character of the penalty to which appellant objects.

In addition, and contrary to appellees' assertion that appellant "has not argued that section 12-22-72 is improperly duplicative of other protections created by Alabama . . . ," Motion, at 20, appellant expressly argued, Juris. Stat., at 19 n.9, that the ability of successful appellees to recover costs *and damages* on appeal under Rule 39, Ala. R. App. P., accentuates the irrational arbitrariness of § 12-22-72. The fact that apparently only two of the fifty States impose such a *mandatory* penalty on defendant-appellants is substantial evidence of the lack of any legitimate state purpose behind § 12-22-72.

B. The Disqualification Question

Appellees' argument that Justice Embry's having voted "in favor of the insurer," Motion, at 21, in nine cases decided by the court below during the pendency of his own bad faith litigation is both irrelevant and misleading. The argument is irrelevant because appellant's contention is that the identity between this case and Justice Embry's own civil actions, coupled with his extraordinary admissions in his deposition, are sufficient, in and of themselves, to require his disqualification under the Due Process Clause. The argument is misleading because, of the cases cited by appellees, none involved a partial payment and, indeed, the only three cases involving the "directed verdict" issue strongly reaffirmed, by a wide margin, the rule announced in *National Savings Life Insurance Co.* v. *Dutton,* 419 So.2d 1357 (Ala. 1982),[5] only serving to accentuate that the five-to-four decision in this case constituted a reversal of those two rules and that it could not have been

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[5] *See Payne* v. *Nationwide Mutual Insurance Co.,* 456 So.2d 34 (Ala. 1984); *Armstrong* v. *Life Insurance Co. of Virginia,* 454 So.2d 1377 (1984); *National Security Fire & Casualty Co.* v. *Vintson,* 454 So.2d 942 (Ala. 1984).

anticipated by appellant. Appellees avoid discussion of the facts related to Justice Embry's conduct because those facts cannot be denied, the conduct cannot be defended, and the circumstances command the result urged by appellant.

The importance of this Court's addressing this question goes well beyond the facts of this case. In an increasingly litigious society in which the rewards of prosecuting a lawsuit can be great—as illustrated by this case, it may be expected that jurists, like other citizens, will seek their day in court. This Court should make clear that judges may not participate in the decision of cases raising the same issues involved in litigation to which they are parties. This Court should also make clear that appellate judges may not abdicate their obligation to pass on the qualifications of their colleagues when it becomes necessary to resolve a substantial federal constitutional challenge presented by a litigant.

C. The Contract Clause Question

Appellees argue both that "the application of the Contract Clause [appellant] espouses is unprecedented . . . ," Motion, at 13-14 n.11, and that "there can be no doubt that the actions of Alabama's courts are not within the ambit of the Contract Clause" based on prior precedents in this Court, *id.*, at 23. Appellees cannot have it both ways; an argument never before advanced or considered by this Court is not likely to be expressly precluded by this Court's prior decisions. The question whether state action escapes scrutiny under the Contract Clause simply because it was taken by one branch of state government rather than by another branch is assuredly a substantial question. In addition, appellees' argument that the bad faith tort, clearly and emphatically recognized for the first time in 1981, imposes no new obligations on the contract involved in this case ignores the fact that but for the creation of that tort and appellant's contractual relationship with appellees, appellant would not be before this Court in this case. The liability for bad faith arises out of an evaluation of the manner in which the contract was performed, and must be viewed as a burden on that contract.

D. The Excessive Fine Clause and Due Process Clause Question

The substantiality of the questions surrounding the punitive damage award has been demonstrated once again in the affirmance by the court below of a punitive damage award of $3,000,000 in the case of *American Pioneer Life Insurance Co.* v. *Sandlin*, No. 82-1063 (Ala. Apr. 12, 1985).[6] In that case, unlike here, the defendant's conduct was actually submitted to the jury on fraud and conspiracy theories. The one Justice who concurred specially in that decision stated that he did so because he could not "conscientiously say that this verdict is more shocking than others this Court has approved." Slip op., at 21 (Maddox, J., concurring specially). This statement suggests that all semblance of control over excessive punitive damage awards by the court below has evaporated, leaving appellant and others similarly situated with nothing more than the protections of the Constitution.

Also, contrary to appellees' argument, Motion, at 26, this question is not foreclosed by this Court's decision in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). Assuming, *arguendo*, that appellant got all the constitutional procedural process it was due in the courts of Alabama in this case, then the "formal adjudication of guilt" has occurred and the constitutionality of the punishment may be addressed by this Court. *Id.*, at 671-72 n.40.

The incongruity of the results which would follow from appellees' Eighth Amendment theories is illustrated by the events of April 30, 1985. On that day, a major national securities brokerage firm entered a plea of guilty to 2,000 counts of violating 18 U.S.C. §§ 1341 & 1343, felony counts for which that company agreed to pay a fine of $2,000,000 plus $750,000 for costs of the investigation and prosecution.[7] This scheme is reported to have involved some $10

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[6] For the convenience of the Court, appellant is lodging ten copies of the opinion in this case with the Clerk simultaneously with the filing of this Reply Memorandum.

[7] *United States* v. *E. F. Hutton Group, Inc.*, Crim. No. 85-00083 (M.D. Pa. Apr. 30, 1985) (Notice of Plea Agreement and Plea Agreement).

billion in illegal "check-rigging" by the defendant.[8] If appellees' theories are correct, a company found guilty of such offenses after a trial in which it enjoyed all the constitutional benefits afforded criminal defendants and upon which a similar punishment was imposed would have the right to challenge the fine under the Excessive Fine Clause. Appellant, on the other hand, after civil trial without the protections afforded the criminal defendant, having been found "guilty" of no more than failure to pay a $1650.22 insurance claim, would have no protection under the Excessive Fine Clause from the $3,500,000 punitive damage award. The fact is that the penalty imposed on appellant is an excessive fine under any rational standard and it should and does make no difference for purposes of the Excessive Fine Clause that it was imposed *without* the due process protections afforded a criminal defendant.

Respectfully submitted,

*Theodore B. Olson
John J. Swenson
Larry L. Simms

Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Of Counsel:

Peter V. Sintz
William M. Cunningham, Jr.

Sintz, Pike, Campbell & Duke
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

**Counsel of Record*

May 14, 1985

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[8] *American Banker*, May 10, 1985, at 1, col. 3.

Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal From the Supreme Court of Alabama

JOINT APPENDIX

*JACK N. GOODMAN
ROBERT TRAGER
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, AL 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE, CROWDER & BROWN
1601 Dauphin Street
Mobile, AL 36660
(205) 471-6191

Attorneys for Appellees

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Counsel of Record

Jurisdictional Statement Filed 4/9/85
Jurisdiction Postponed To Hearing On The Merits 6/3/85

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DOCKET ENTRIES IN SUPREME COURT OF ALABAMA*

AETNA LIFE & CASUALTY INSURANCE COMPANY, INC.
MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.
5cc 9-8-83 cm [app. brief filed]

10-6-83	cm Oral Argument Requested By Appellee Denied 11-17-83
11-17-83	Submitted ON BRIEFS (SET ASIDE 4-4-84) Division MADDOX DIVISION
4-4-84	CALLED ATTORNEYS RE: SETTING ASIDE SUBMISSION AND GRANTING OF ORAL ARGUMENT. (PER JTWA)
5-14-84	Submitted ARGUED & SUBMITTED Division TO,MA,FA,JO,AL,SH,EM,BE&AD
12-7-84	Judgment AFFIRMED
12-7-84	Opinion By PER CURIAM
12-7-84	Concurrences FAULKNER, JONES, ALMON, EMBRY & ADAMS, JJ., CONCUR; TORBERT, CJ., MADDOX, SHORES & BEATTY, JJ., DISSENT.
12-21-84	Application for Rehearing Filed brief due 12-28-84 Alg BRIEFS FILED: 12-28-84 (9 copies)
1-4-85	Called J. Brown re: filing reply to rehearing by filed by Sintz and Cunningham by 1-18-85. Brown may respond to amicus briefs at own discretion. NTWA/TB/sjm
1-7-85	1cc John Crowder's Motion for Extension of Time for 14 additional days to File Brief in Response to Application for Rehearing—granted to 2-1-85
1-9-85	Letter from Joseph Brown confirming the filing date of January 18, 1985 for filing brief in response to appellant's brief in support of its motion for rehearing/awk-JTWA
	Response to Rehearing Briefs filed 1-17-85 (9 copies) [appellees brief]

*The relevant docket entries are printed in chronological order, thereby not necessarily reflecting the order in which they appear on the three-page docket sheet which was lodged by appellant with the Clerk of this Court on April 9, 1985 and which has also been forwarded to the clerk of this Court by the clerk of the Supreme Court of Alabama in connection with transmittal of the record by the latter to this Court.

2-22-85	9 cc Appellant's Motion for Disqualification and Motion for Withdrawal of Opinion of December 7, 1984 and for Hearing De Novo/awk-JTWA
3-1-85	9cc Appellees', Margaret and Roger Lavoie, Objection to Motion for Disqualification and Motion for Withdrawal of Opinion and for Hearing De Novo/ awk-JTWA
3-1-85	10cc Application and Brief of Amicus Curiae filed by the Alabama Trial Lawyers Association/awk-JTWA
3-7-85	10cc Amendment to motion for disqualification and motion for withdrawal of opinion of 12-7-84 and for hearing de novo (filed by Sintz and Cunningham)
3-8-85	Action on Rehearing OVERRULED—(ALL JJ STAY AS WERE ON ORIGINAL OPINION) MOTION FOR DISQUALIFICATION AND WITHDRAWAL OF OPINION OF 12-7-84 AND FOR HEARING DE NOVO DENIED. (Fau, Jo, Al, Bea & Ad, conour; Tor, Ma & Sh, JJ, concurring specially to deny)
3-22-85	10cc—Appellant's Motion to Suspend the Rules and Motion for Stay bof Execution of Judgment/awk-bjmc-Court
3-22-85	10cc—Amendment to Appellant's Motion to Suspend Rules and Motion for Stay of Execution of Judgment/ awk-bjmc-Court
3-25-85	ORDERED that the motion to suspend rules and motion for stay of execution of judgment and the amendment to motion to suspend rules and motion for stay of execution of judgment be, and the same are hereby, denied. Torbert, C. J., and Maddox, Faulkner, Almon, Shores, Embry, Beatty, and Adams, JJ., concur; Jones, J., not sitting. lbl
3-25-85	2cc Appellant's Notice of Appeal to Supreme Court of the United States/awk-dn

CIVIL CASE ACTION SUMMARY*

Case Number CV-78-001614

In the Circuit Court of Mobile County *Margaret W. Lavoie and Roger J. Lavoie, Sr. v. Aetna Life and Casualty Co., Inc.*, a corporation.

9-29-78	Complaint & Summons
10-17-78	Defendant's motion for court to dismiss the complaint.
11-17-78	Motion to dismiss the complaint under Count 1, denied; Count 2, 3, 4 and 5, dismissed with prejudice.
12-15-78	Amended Complaint
12-15-78	Notice of Appeal to the Supreme Court filed this date by the Plaintiffs from the order of November 17, 1978 dismissing counts 2, 3, 4 and 5.
9-4-79	Opinion received this date from the Supreme Court reversing and remanding.
9-20-79	Certificate of reversal received this date from the Supreme Court. ORDERED that the judgment of the circuit court be reversed and annulled and that this cause be remanded to the court below for further proceedings therein. FURTHER ORDERED that the appellee, Aetna Life and Casualty Company, Inc., a corporation, pay the costs of appeal as provided by the ARAP, for which costs let execution issue.
2-29-80	Plaintiffs' second amended complaint (NO SUMMONS)
8-21-80	Third Amended Complaint.
9-22-80	Defendant's motion for court to enter a summary judgment in its favor dismissing the complaint.
10-10-80	Motion granted as to Counts 2, 3, 5 & 6; Denied as to others.
12-12-80	Appeal docketed. No. 80-149.

*These pertinent Docket entries are found in the record at pp. 65-71.

10-5-81	Opinion from Supreme Court: The judgment of the Circuit Court of Mobile County, Alabama is reversed and remanded with directions to that court to reconsider the insurer's motion for summary judgment in the light of the teachings of *Chavers*.
10-26-81	Certificate of judgment dated October 2, 1981 received this date from the Supreme Court. ORDERED AND ADJUDGED that the judgment of the Circuit Court be reversed and annulled and that this cause be remanded to the Circuit Court with directions to reconsider the insurer's motion for summary judgment, in the light of the decision in Chavers v. National Security Fire and Casualty Company. FURTHER ORDERED that the appellee, Aetna Life and Casualty Company, Inc., a corporation, pay the costs of appeal as provided by the RAP, for which costs let execution issue.
11-16-81	Fourth Amended Complaint—Adding Counts 7 and 8 (No summons issued.)
11-3-82	Defendant, Aetna Life and Casualty Company, Inc's motion for directed verdict filed at close of plaintiff's case. November 4, 1982—Jury and Verdict for the plaintiffs and against the defendant for the sum of $3,501,650.22.
12-20-82	Defendant's brief in support of motion for new trial, judgment notwithstanding the verdict, and remittitur.
12-29-82	Plaintiffs' reply brief on motion for new trial, judgment notwithstanding the verdict, and remittitur.
2-10-83	Notice of Appeal to the Supreme Court filed this date by the Defendant from the jury and verdict of November 4, 1982 in favor of Plaintiffs and against defendant for $3,501.650.22 and from the order of January 28, 1983 denying defendant's motion for Court to enter a verdict in favor of the defendant or in the alternative for a remittitur, or in the alternative a new trial.

2-10-83	Supersedes Bond in the amount of $4,377,062.78 filed with The Aetna Casualty and Surety Co., surety.
2-10-83	$50.00 docket fee.
2-10-83	Designation of Record on Appeal.
2-10-83	Letter of transmittal.
2-24-83	Appeal docketed. No. 82-426.

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV-78-001614

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,

Plaintiffs.

-VS-

AETNA LIFE AND CASUALTY COMPANY, INC., a corporation; A, B, and C, the person, firm, or corporation which issued the policy made the subject and basis of this suit; D, E, and F, the person, firm or corporation charged with the responsibility of exercising good faith and due care in the payment of benefits under the policy made the basis of this suit; whose names and legal identities are unknown to the Plaintiff at this time, but which will be substituted by amendment when ascertained,

Defendants.

FIRST CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, alleges that heretofore and on, to-wit, February 3, 1977, the Plaintiff entered the Mobile Infirmary, Mobile, Alabama, to undergo a series of tests which had been prescribed by her physician.

2. As a result of the above described hospital confinement between February 3 and February 26, 1977, the Plaintiff incurred a total charge from the Mobile Infirmary of Three Thousand Twenty-eight and 25/100 ($3,028.25) Dollars.

3. The Plaintiff further alleges that at the time the said hospital expenses were incurred and for some period of time previous thereto, she was an insured beneficiary within the terms of a Group Policy of Health and Medical Insurance issued by the Defendant, Aetna Life and Casualty Company,

[1]*

Inc. (Hereinafter referred to as Aetna), and issued to the City of Mobile as policyholder and which was in full force and effect at the time the said expenses were incurred, the said City of Mobile having paid premiums to the Defendant, Aetna, for the Plaintiff's benefit.

4. The Plaintiff further alleges that the expenses incurred by her while confined to the Mobile Infirmary during the above described period were expenses which the Defendant, Aetna, had contracted to pay and were under a duty to pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna, to the City of Mobile as policyholder.

5. The Plaintiff further alleges that the Defendant, Aetna, is a foreign corporation doing business in Mobile County, Alabama.

6. The Plaintiff further alleges that the Defendant, Aetna, did pay a portion of the total charge incurred by the Plaintiff as a result of her above described confinement, but that the Defendant, Aetna, has steadfastly refused the demands of the Plaintiff to pay the balance due on her account of One Thousand Six Hundred Fifty and 22/100 ($1,650.22) Dollars.

7. The Plaintiff further alleges that the refusal of the Defendant, Aetna, to pay the said benefits due under the contract of insurance constitutes a breach of the contract of insurance under which the Plaintiff is a beneficiary.

WHEREFORE, the Plaintiff, MARGARET W. LAVOIE, demands judgment of the Defendant in the amount of ONE THOUSAND SIX HUNDRED FIFTY and 22/100 ($1,650.22) DOLLARS, plus costs and interest.

[2]

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*Page no. of record on initial appeal of case to Supreme Court of Alabama.

SECOND CAUSE OF ACTION

1. The Plaintiff, MARGARET W. LAVOIE, realleges all of the allegations contained in Paragraphs 1, 2, 3, 4, 5, and 6 of the First Cause of Action.

7. The Plaintiff further alleges against the Defendant, Aetna, that subsequent to the initial denial of benefits by the Defendant on the grounds that the tests performed on the Plaintiff should have been incurred in an outpatient rather than an inpatient basis, the Plaintiff supplied the Defendant with medical reports from her admitting physician which recited the fact that at the time of her admission into the hospital, the controller atmosphere of the hospital was necessary to carry out the required testing and observation of the Plaintiff.

8. The Plaintiff further alleges that the steadfast refusal of the Defendant to pay the claimed benefits in light of the evidence available to the Defendant in the form of the admitting physician's reports regarding the necessity of her treatment as an inpatient, constituted outrageous, malicious and oppressive conduct on the part of the Defendant and exhibited wanton and reckless disregard of the probability of causing severe emotional distress to the Plaintiff.

9. The Plaintiff further alleges that as a proximate result of the Defendant's reckless, wanton, malicious, oppressive and outrageous conduct in the denial of the said claim, she has been caused to suffer the following injuries: she has suffered severe emotional distress; she has been caused to see numerous physicians, psychologists and psychiatrists for treatment of her emotional distress; she has suffered a complete

[3]

and total nervous breakdown; she has been permanently injured; she has, as a result of her severe emotional distress, suffered severe bodily dysfunction proximately resulting from her emotional distress; she was caused to be voluntarily committed to the Searcy Mental Hospital; she has suffered much

embarrassment, humiliation, and sleeplessness; she has suffered much pain and suffering, both physical and mental, still so suffers, and will so suffer in the future; and her credit and reputation have been damaged.

WHEREFORE, the Plaintiff, MARGARET W. LAVOIE, demands judgment of the Defendant in the amount of ONE MILLION ($1,000,000.00) DOLLARS as compensatory and punitive damages.

THIRD CAUSE OF ACTION

1. The Plaintiff, MARGARET W. LAVOIE, realleges the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, and 7 of the Second Cause of Action.

8. The Plaintiff further alleges that the refusal of the Defendant to pay the claimed benefits in light of the evidence available to the Defendant in the form of the admitting physician's reports regarding the necessity of her treatment as an inpatient constituted a negligent and/or wanton breach of the implied duty to deal in good faith in its contractual relationships, and of the implied duty to exercise due care in the performance of its contractual obligations.

9. The Plaintiff further alleges that as a proximate result of the negligence and/or wantonness of the Defendant in tortiously breaching the implied duties of good faith in

[4]

its dealings and of due care in the performance of its obligations under the contract, the Plaintiff sustained the injuries as set forth in Paragraph 8 of the Second Cause of Action and incorporates the same by reference herein.

WHEREFORE, the Plaintiff, MARGARET W. LAVOIE, demands judgment of the Defendant in the amount of ONE MILLION ($1,000,000.00) DOLLARS as compensatory and punitive damages.

FOURTH CAUSE OF ACTION

1. Plaintiff, ROGER J. LAVOIE, SR., who is the husband of the Plaintiff, Margaret W. Lavoie, realleges all of the allegations contained in Paragraphs 1, 7, 8, and 9 of the Second Cause of Actiion.

10. The Plaintiff alleges that as a further proximate result of the Defendant's reckless, wanton, malicious, oppressive and outrageous conduct in the denial of the said claim and the injuries to his said wife, he was caused to lose the services and consortium of his said wife over a long period of time and will lose her services and consortium in the future.

WHEREFORE, Plaintiff, ROGER J. LAVOIE, SR., demands judgment of the Defendant in the amount of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS as compensatory and punitive damages.

FIFTH CAUSE OF ACTION

1. Plaintiff, ROGER J. LAVOIE, SR., who is the husband of the Plaintiff, Margaret W. Lavoie, realleges the allegations of Paragraphs 1, 8, and 9 of the Third Cause of Action.

10. The Plaintiff further alleges that as a proximate result of the negligence and/or wantonness of the Defendant in tortiously breaching the implied duties of good faith in its dealings and of due care in the performance of its obligations under the contract and the injuries to his said wife,

[5]

he was caused to lose the services and consortium of his said wife over a long period of time and will lose her services and consortium in the future.

WHEREFORE, Plaintiff, ROGER J. LAVOIE, SR., demands judgment of the Defendant in the amount of ONE THOUSAND ($100,000.00) DOLLARS as compensatory and punitive damages.

CUNNINGHAM, BOUNDS, BYRD, YANCE
AND CROWDER
Attorneys for Plaintiffs

BY: _____
JOSEPH M. BROWN, JR.
P.O. Box 66705
Mobile, Alabama 36606

_____
THOMAS E. HARRISON
Attorney for Plaintiffs
P.O. Box 433
Mobile, Alabama 36601

Plaintiffs respectfully demand a trial by jury of this cause.

_____
JOSEPH M. BROWN, JR.

Defendant may be served at:

Aetna Life and Casualty Company, Inc.
951 Government Street—Suite 500
Mobile, Alabama

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV 78-001614

MARGARET W. LAVOIE and ROBERT J. LAVOIE, SR.,
Plaintiffs

VS.

AETNA LIFE AND CASUALTY COMPANY, INC., a corporation; A, B and C, the person, firm, or corporation which issued the policy made the subject and basis of this suit, D, E and F, the person, firm, or corporation charged with the responsibility of exercising good faith and due care in the payment of benefits under the policy made the basis of this suit; whose names and legal identities are unknown to the Plaintiff at this time, but which will be substituted by amendment when ascertained,
Defendants

AMENDED COMPLAINT

Come the Plaintiffs in the above styled cause, the Second, Third, Fourth and Fifth Causes of Action having been dismissed and Final Judgment thereon having been entered by Order of the Court dated November 17, 1978, and amend the complaint filed heretofore in said action so that body of the complaint shall read as follows:

FIRST CAUSE OF ACTION

1. The Plaintiff, MARGARET W. LAVOIE, alleges that heretofore and on, to-wit, February 3, 1977, the Plaintiff entered the Mobile Infirmary, Mobile, Alabama, to undergo a series of tests which had been prescribed by her physician.

2. As a result of the above described hospital confinement between February 3 and February 26, 1977, the Plaintiff in-

curred a total charge from the Mobile Infirmary of Three Thousand Twenty-eight and 25/100 ($3,028.25) Dollars.

3. The Plaintiff further alleges that at the time the said hospital expenses were incurred and for some period of time

[14]*

previous thereto, she was insured beneficiary within the terms of a Group Policy of Health and Medical Insurance issued by the Defendant, Aetna Life and Casualty Company, Inc. (hereinafter referred to as Aetna), and issued to the City of Mobile as policyholder and which was in full force and effect at the time the said expenses were incurred, the said City of Mobile having paid premiums to the Defendant, Aetna, for the Plaintiff's benefit.

4. The Plaintiff further alleges that the expenses incurred by her while confined to the Mobile Infirmary during the above described period were expenses which the Defendant, Aetna, had contracted to pay and were under a duty to pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna, to the City of Mobile as policyholder.

5. The Plaintiff further alleges that the Defendant, Aetna, as a foreign corporation doing business in Mobile County, Alabama.

6. The Plaintiff further alleges that the Defendant, Aetna, did pay a portion of the total charge incurred by the Plaintiff as a result of her above described confinement, but that the Defendant, Aetna, has steadfastly refused the demands of the Plaintiff to pay the balance due on her account of One Thousand Six Hundred Fifty and 22/100 ($1,650.22) Dollars.

7. The Plaintiff further alleges that the refusal of the Defendant, Aetna, to pay the said benefits due under the contract of insurance constitutes a breach of the contract of insurance under which the Plaintiff is a beneficiary.

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*Page no. of record on initial appeal of case to Supreme Court of Alabama.

WHEREFORE, The Plaintiff, MARGARET W. LAVOIE, demands judgment of the Defendant in the amount of ONE THOUSAND SIX HUNDRED FIFTY and 22/100 ($1,650.22) DOLLARS, plus costs and interests.

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SIXTH CAUSE OF ACTION

1. The Plaintiff, MARGARET W. LAVOIE, realleges and incorporates by reference all of the allegations contained in paragraphs 1, 2 and 3 of the First Cause of Action.

4. The Plaintiff further alleges that the expenses incurred by her while confined to the Mobile Infirmary during the above described period were expenses which the Defendant, Aetna, had fraudulently represented to the Plaintiff that the Defendant would pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna.

5. The Plaintiff further alleges that the expenses incurred by her while confined to the Mobile Infirmary during the above described period were incurred in justifiable reliance upon the representation by the Defendant, Aetna, that such expenses would be paid under the provisions of the policy of insurance issued by the Defendant, Aetna, for the Plaintiff's benefit.

6. The Plaintiff further alleges that the Defendant, Aetna, is a foreign corporation doing business in Mobile County, Alabama.

7. The Plaintiff further alleges that as a proximate consequence of the fraudulent representations by the Defendant, Aetna, that the charges incurred by the Plaintiff as a result of the above described period of hospital confinement would be paid under the provisions of the above described policy of insurance, the Plaintiff has sustained a loss of ONE THOUSAND SIX HUNDRED FIFTY and 22/100 ($1,650.22) DOLLARS which represents that portion of the hospital expenses incurred by the Plaintiff which the Defendant has refused to pay.

WHEREFORE, the Plaintiff, MARGARET W. LAVOIE, demands judgment against the Defendant in the amount of ONE THOUSAND SIX HUNDRED FIFTY AND 22/100 ($1,650.22) DOLLARS as compensatory damages and FIFTY THOUSAND ($50,000.00) DOLLARS as punitive damages plus costs.

CUNNINGHAM, BOUNDS, BYRD
YANCE & CROWDER

BY:_____
JOSEPH M. BROWN, JR.

I do hereby certify that I on this 22 day of November 1978, served a copy of the foregoing Amended Complaint on Pete Sintz, Esquire, 3100 Cottage Hill Road, Mobile, Alabama by mailing same postage prepaid.

_____
JOSEPH M. BROWN, JR.

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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV-78-001614

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Plaintiffs

-VS-

AETNA LIFE AND CASUALTY COMPANY, INC., A CORPORATION, *et al.*,
Defendants.

SECOND AMENDED COMPLAINT

Come the Plaintiffs in the above styled cause and amend the body of the complaint filed heretofore in this cause to read as follows:

FIRST CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, alleges that heretofore and on, to-wit, February 3, 1977, the Plaintiff entered the Mobile Infirmary, Mobile, Alabama, to undergo a series of tests which had been prescribed by her physician.

2. As a result of the above described hospital confinement between February 3 and February 26, 1977, the Plaintiff incurred a total charge from the Mobile Infirmary of Three Thousand Twenty-eight and 25/100 ($3,028.25) Dollars.

3. The Plaintiff further alleges that at the time the said hospital expenses were incurred and for some period of time previous thereto, she was an insured beneficiary within the terms of a Group Policy of Health and Medical Insurance issued by the Defendant, Aetna Life and Casualty Company, Inc. (hereinafter referred to as Aetna), and issued to the City of

Mobile as policyholder and which was in full force and effect at the time the said expenses were incurred, the said City of Mobile having paid premiums to the Defendant, Aetna, for the Plaintiff's benefit.

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4. The Plaintiff further alleges that the expenses incurred by her while confined to the Mobile Infirmary during the above described period were expenses which the Defendant, Aetna, had contracted to pay and were under a duty to pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna, to the City of Mobile as policyholder.

5. The Plaintiff further alleges that the Defendant, Aetna, is a foreign corporation doing business in Mobile County, Alabama.

6. The Plaintiff further alleges that the Defendant, Aetna, did pay a portion of the total charge incurred by the Plaintiff as a result of her above described confinement, but that the Defendant, Aetna, has steadfastly refused the demands of the Plaintiff to pay the balance due on her account of One Thousand Six Hundred Fifty and 22/100 ($1,650.22) Dollars.

7. The Plaintiff further alleges that the refusal of the Defendant, Aetna, to pay the said benefits due under the contract of insurance constitutes a breach of the contract of insurance under which the Plaintiff is a beneficiary.

WHEREFORE, the Plaintiff, Margaret W. Lavoie, demands judgment of the Defendant in the amount of ONE THOUSAND SIX HUNDRED FIFTY and 22/100 ($1,650.22) DOLLARS, plus costs and interest.

SECOND CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, realleges all of the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of the First Cause of Action.

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*Page no. of record on second appeal of case to Supreme Court of Alabama.

7. The Plaintiff further alleges against the Defendant, Aetna, that subsequent to the initial denial of benefits by

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the Defendant on the grounds that the tests performed on the Plaintiff should have been incurred in an outpatient rather than an inpatient basis, and at the Defendant's request that a medical report from the admitting physician be supplied to the Defendant, the Plaintiff supplied the Defendant with medical reports from her admitting physician which recited the fact that at the time of her admission into the hospital, the controlled atmosphere of the hospital was necessary to carry out the required testing and observation of the Plaintiff.

8. The Plaintiff further alleges that the steadfast refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nursing notes and admitting physician's reports regarding the necessity of her treatment as an inpatient, constituted outrageous, malicious and oppressive conduct on the part of the Defendant and exhibited wanton and reckless disregard of the probability of causing severe emotional distress to the Plaintiff.

9. The Plaintiff further alleges that as a proximate result of the Defendant's reckless, wanton, malicious, oppressive and outrageous conduct in the denial of the said claim, she has been caused to suffer the following injuries: she has suffered severe emotional distress; she has suffered much embarrassment, humiliation, and sleeplessness; she has suffered emotionally, still so suffers, and will so suffer in the future; and her credit and reputation have been damaged.

WHEREFORE, the Plaintiff, Margaret W. Lavoie, demands judgment of the Defendant in the amount of ONE MILLION ($1,000,000.00) DOLLARS as compensatory and punitive damages.

THIRD CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, realleges the allegations contained in Paragraphs 1, 2, 3, 4, 5, 6, and

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7 of the Second Cause of Action.

8. The Plaintiff further alleges that the refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nurse's notes and admitting physician's reports regarding the necessity of her treatment as an inpatient constituted a reckless and/or wilful and/or wanton breach of the implied duty to deal in good faith in its contractual relationships, and of the implied duty to exercise due care in the performance of its contractual obligations.

9. The Plaintiff further alleges that as a proximate result of the above described reckless, wilful and/or wanton conduct of the Defendant in tortiously breaching the implied duties of good faith in its dealings and of due care in the performance of its obligations under the contract, the Plaintiff sustained the injuries as set forth in Paragraph 9 of the Second Cause of Action and incorporates the same by reference herein.

WHEREFORE, the Plaintiff, Margaret W. Lavoie, demands judgment of the Defendant in the amount of ONE MILLION ($1,000,000.00) DOLLARS as compensatory and punitive damages.

FOURTH CAUSE OF ACTION

1. The Plaintiff, Roger J. Lavoie, Sr., who is the husband of the Plaintiff, Margaret W. Lavoie, alleges that on, to-wit, February 3, 1977, the said Margaret W. Lavoie entered the Mobile Infirmary, Mobile, Alabama, to undergo a series of tests which had been prescribed by her physician, for which the Plaintiff Roger J. Lavoie, Sr., incurred a total charge from the Mobile Infirmary of Three Thousand Twenty-eight and

25/100 ($3,028.25) Dollars for treatment of his said wife between February 3 and February 26, 1977.

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2. The Plaintiff further alleges that at the time the said hospital expenses were incurred and for some period of time previous thereto, he was an insured beneficiary within the terms of a Group Policy of Health and Medical Insurance issued by the Defendant, Aetna Life and Casualty Company, Inc., and issued to the City of Mobile as policyholder and which was in full force and effect at the time the said expenses were incurred, the said City of Mobile having paid premiums to the Defendant, Aetna, for the Plaintiff's benefit.

3. The Plaintiff further alleges that the expenses incurred by him due to his said wife's hospitalization in the Mobile Infirmary during the the above described period were expenses which the Defendant, Aetna, had conracted to pay and were under a duty to pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna, to the City of Mobile as policyholder.

4. The Plaintiff further alleges that the Defendant, Aetna, is a foreign corporation doing business in Mobile County, Alabama.

5. The Plaintiff further alleges that the Defendant, Aetna, did pay a portion of the total charge incurred by the Plaintiff as a result of his said wife's above described confinement, but that the Defendant, Aetna, has steadfastly refused the demands of the Plaintiff to pay the balance due on his account of One Thousand Six Hundred Fifty and 22/100 ($1,650.22) Dollars.

6. The Plaintiff further alleges that the refusal of the Defendant, Aetna, to pay the said benefits due under the contract of insurance constitutes a breach of the cont. act of insurance under which the Plaintiff is a beneficiary.

WHEREFORE, the Plaintiff, Roger J. Lavoie, Sr., demands judgment of the Defendant in the amount of ONE THOUSAND SIX

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HUNDRED FIFTY and 22/100 ($1,650.22) DOLLARS, plus costs and interest.

FIFTH CAUSE OF ACTION

1. The Plaintiff, Roger J. Lavoie, Sr., realleges all of the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of the Fourth Cause of Action and incorporates the same by reference herein.

6. The Plaintiff further alleges against the Defendant, Aetna, that subsequent to the initial denial of benefits by the Defendant on the grounds that the tests performed on the Plaintiff's wife, Margaret W. Lavoie, should have been incurred in an outpatient rather than an inpatient basis, and at the Defendant's request that a medical report from the admitting physician be supplied to the Defendant, the Plaintiff supplied the Defendant with medical reports from his said wife's admitting physician which recited the fact that at the time of the Plaintiff's wife's admission into the hospital, the controlled atmosphere of the hospital was necessary to carry out the required testing and observation of the Plaintiff's wife.

7. The Plaintiff further alleges that the steadfast refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nursing notes and admitting physician's reports regarding the necessity of his wife's treatment as an inpatient, constituted outrageous, malicious and oppressive conduct on the part of the Defendant and exhibited wanton and reckless disregard of the probability of causing severe emotional distress to the Plaintiff.

8. The Plaintiff further alleges that as a proximate result of the Defendant's reckless, wanton, malicious, oppressive and

outrageous conduct in the denial of the said claim, he has been caused to suffer the following injuries: he has suffered severe emotional distress; he has suffered much embarrassment, humiliation, and sleeplessness; he

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has suffered emotionally, still so suffers, and will so suffer in the future; and his credit and reputation have been damaged.

WHEREFORE, the Plaintiff, Roger J. Lavoie, Sr., demands judgment of the Defendant in the amount of ONE MILLION ($1,000,000.00) DOLLARS as compensatory and punitive damages.

SIXTH CAUSE OF ACTION

1. The Plaintiff, Roger J. Lavoie, Sr., realleges all of the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of the Fifth Cause of Action and incorporates the same by reference herein.

7. The Plaintiff further alleges that the refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nurse's notes and admitting physician's reports regarding the necessity of his wife's treatment as an inpatient constituted a reckless and/or wilful and/or wanton breach of the implied duty to deal in good faith in its contractual relationships, and of the implied duty to exercise due care in the performance of its contractual obligations.

8. The Plaintiff further alleges that as a proximate result of the above described reckless, wilful and/or wanton conduct of the Defendant in tortiously breaching the implied duties of good faith in its dealings and of due care in the performance of its obligations under the contract, the Plaintiff sustained the injuries as set forth in Paragraph 8 of the Fifth Cause of Action.

WHEREFORE, the Plaintiff, Roger J. Lavoie, Sr., demands judgment of the Defendant in the amount of ONE MILLION ($1,000,000.00) DOLLARS as compensatory and punitive damages.

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CUNNINGHAM, BOUNDS, BYRD,
YANCE & CROWDER
Attorneys for Plaintiffs

BY:_____
JOSEPH M. BROWN, JR.

Plaintiffs respectfully demand a trial by jury.

BY:_____
JOSEPH M. BROWN, JR.

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV-78-001614

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Plaintiffs,

-VS-

AETNA LIFE & CASUALTY CO., INC., a corporation, *et al.*,
Defendants.

THIRD AMENDED COMPLAINT

Come the Plaintiffs in the above styled cause and amend the body of the complaint filed heretofore in this cause to read as follows:

FIRST CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, alleges that heretofore and on, to-wit, February 3, 1977, the Plaintiff entered the Mobile Infirmary, Mobile, Alabama, to undergo a series of tests which had been prescribed by her physician.

2. As a result of the above described hospital confinement between February 3 and February 26, 1977, the Plaintiff incurred a total charge from the Mobile Infirmary of Three Thousand Twenty-eight and 25/100 ($3,028.25) Dollars.

3. The Plaintiff further alleges that at the time the said hospital expenses were incurred and for some period of time previous thereto, she was an insured beneficiary within the terms of a Group Policy of Health and Medical Insurance issued by the Defendant, Aetna Life and Casualty Company, Inc. (hereinafter referred to as Aetna), and issued to the City of Mobile as policyholder and which was in full force and effect at

the time the said expenses were incurred, the said City of Mobile having paid premiums to the Defendant, Aetna, for the Plaintiff's benefit.

[915]*

4. The Plaintiff further alleges that the expenses incurred by her while confined to the Mobile Infirmary during the above described period were expenses which the Defendant, Aetna, had contracted to pay and were under a duty to pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna, to the City of Mobile and policyholder.

5. The Plaintiff further alleges that the Defendant, Aetna, is a foreign corporation doing business in Mobile County, Alabama.

6. The Plaintiff further alleges that the Defendant, Aetna, did pay a portion of the total charge incurred by the Plaintiff as a result of her above described confinement, but that the Defendant, Aetna, has steadfastly refused the demands of the Plaintiff to pay the balance due on her account of One Thousand Six Hundred Fifty and 22/100 ($1,650.22) Dollars.

7. The Plaintiff further alleges that the refusal of the Defendant, Aetna, to pay the said benefits due under the contract of insurance constitutes a breach of the contract of insurance under which the Plaintiff is a beneficiary.

WHEREFORE, the Plaintiff demands judgment against the Defendants in the sum of ONE THOUSAND SIX HUNDRED FIFTY AND 22/100 DOLLARS plus costs and interest.

SECOND CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, realleges all of the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of the First Cause of Action and incorporates the same by reference herein.

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*Page no. of record on second appeal to Supreme Court of Alabama.

7. The Plaintiff further alleges against the Defendant, Aetna, that subsequent to the initial denial of benefits by the Defendant on the grounds that the tests performed on the Plaintiff should have been incurred in an outpatient rather than an inpatient basis, and at the Defendant's request that

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a medical report from the admitting physician be supplied to the Defendant, the Plaintiff supplied the Defendant with medical reports from her admitting physician which recited the fact that at the time of her admission into the hospital the controlled atmosphere of the hospital was necessary to carry out the required testing and observation of the Plaintiff.

8. The Plaintiff further alleges that the steadfast refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nursing notes and admitting physician's reports regarding the necessity of her treatment as an inpatient, constituted outrageous, malicious and oppressive conduct on the part of the Defendant and exhibited wanton and reckless disregard of the probability of causing severe emotional distress to the Plaintiff.

9. The Plaintiff further alleges that as a proximate result of the Defendant's reckless, wanton, malicious, oppressive and outrageous conduct in the denial of the said claim, she has been caused to suffer the following injuries and damages: she has suffered severe emotional distress; she has suffered much embarrassment, humiliation, and sleeplessness; she has suffered emotionally, still so suffer, and will so suffer in the future; and her credit and reputation have been damaged.

WHEREFORE, the Plaintiff demands judgment against the Defendants in the sum of FIVE MILLION ($5,000,000.00) DOLLARS as compensatory and punitive damages.

THIRD CAUSE OF ACTION

1. The Plaintiff, Margaret W. Lavoie, realleges all of the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the

Second Cause of Action and reincorporates the same by reference herein.

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8. The Plaintiff further alleges that the refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nurse's notes and admitting physician's reports regarding the necessity of her treatment as an inpatient constituted a reckless and/or wilful and/or wanton breach of the implied duty to deal in good faith in its contractual relationships, and of the implied duty to exercise due care in the performance of its contractual obligations.

9. The Plaintiff further alleges that as a proximate result of the above described reckless, wilful and/or wanton conduct of the Defendant in tortiously breaching the implied duties of good faith in its dealings and of due care in the performance of its obligations under the contract, the Plaintiff sustained the injuries as set forth in paragraph nine of the Second Cause of Action, those injuries being set forth and incorporated by reference herein.

WHEREFORE, the Plaintiff demands judgment against the Defendants in the sum of FIVE MILLION ($5,000,000.00) DOLLARS as compensatory and punitive damages.

FOURTH CAUSE OF ACTION

1. The Plaintiff, Roger J. Lavoie, Sr., who is the husband of the Plaintiff, Margaret W. Lavoie, alleges that on, to-wit, February 3, 1977, the said Margaret W. Lavoie entered the Mobile Infirmary, Mobile, Alabama, to undergo a series of tests which had been prescribed by her physician, for which the Plaintiff Roger J. Lavoie, Sr., incurred a total charge from the Mobile Infirmary of Three Thousand Twenty-eight and 25/100 ($3,028.25) Dollars for treatment of his said wife between February 3 and February 26, 1977.

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2. The Plaintiff further alleges that at the time the said hospital expenses were incurred and for some period of time previous thereto, he was an insured beneficiary within the terms of a Group Policy of Health and Medical Insurance issued by the Defendant, Aetna Life and Casualty Company, Inc., and issued to the City of Mobile as policyholder and which was in full force and effect at the time the said expenses were incurred, the said City of Mobile having paid premiums to the Defendant, Aetna, for the Plaintiff's benefit.

3. The Plaintiff further alleges that the expenses incurred by him due to his said wife's hospitalization in the Mobile Infirmary during the above described period were expenses which the Defendant, Aetna, had contracted to pay and were under a duty to pay under the terms and conditions of the policy of insurance issued by the Defendant, Aetna, to the City of Mobile as policyholder.

4. The Plaintiff further alleges that the Defendant, Aetna, is a foreign corporation doing business in Mobile County, Alabama.

5. The Plaintiff further alleges that the Defendant, Aetna, did pay a portion of the total charge incurred by the Plaintiff as a result of his said wife's above described confinement, but that the Defendant, Aetna, has steadfastly refused the demands of the Plaintiff to pay the balance due on his account of One Thousand Six Hundred Fifty and 22/100 ($1,650.22) Dollars.

6. The Plaintiff further alleges that the refusal of the Defendant, Aetna, to pay the said benefits due under the contract of insurance constitutes a breach of the contract of insurance under which the Plaintiff is a beneficiary.

WHEREFORE, the Plaintiff demands judgment against the Defendants in the sum of ONE THOUSAND SIX HUNDRED AND FIFTY AND 22/100 ($1,650.22) DOLLARS plus costs and interest.

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FIFTH CAUSE OF ACTION

1. The Plaintiff, Roger J. Lavoie, Sr., realleges all of the allegations contained in Paragraphs 1, 2, 3, 4 and 5 of the Fourth Cause of Action and incorporates the same by reference herein.

6. The Plaintiff further alleges against the Defendant, Aetna, that subsequent to the initial denial of benefits by the Defendant on the grounds that the tests performed on the Plaintiff's wife, Margaret W. Lavoie, should have been incurred in an outpatient rather than an inpatient basis, and at the Defendant's request that a medical report from the admitting physician be supplied to the Defendant, the Plaintiff supplied the Defendant with medical reports from his said wife's admitting physician which recited the fact that at the time of the Plaintiff's wife's admission into the hospital, the controlled atmosphere of the hospital was necessary to carry out the required testing and observation of the Plaintiff's wife.

7. The Plaintiff further alleges that the steadfast refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nursing notes and admitting physician's reports regarding the necessity of his wife's treatment as an inpatient, constituted outrageous, malicious and oppressive conduct on the part of the Defendant and exhibited wanton and reckless disregard of the probability of causing severe emotional distress to the Plaintiff.

8. The Plaintiff further alleges that as a proximate result of the Defendant's reckless, wanton, malicious, oppressive and outrageous conduct in the denial of the said claim, he has been caused to suffer the following injuries and damages: he has suffered

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severe emotional distress; he has suffered much embarrassment, humiliation and sleeplessness; he has suffered emo-

tionally, still so suffers, and will so suffer in the future; and his credit and reputation have been damaged.

WHEREFORE, the Plaintiff demands judgment against the Defendants in the sum of FIVE MILLION ($5,000,000.00) DOLLARS as compensatory and punitive damages.

SIXTH CAUSE OF ACTION

1. The Plaintiff, Roger J. Lavoie, Sr., realleges all of the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of the Fifth Cause of Action and incorporates the same by reference herein.

7. The Plaintiff further alleges that the refusal of the Defendant to pay the claimed benefits in light of all of the evidence available to the Defendant, particularly in the form of the hospital records, nurse's notes and admitting physician's reports regarding the necessity of his wife's treatment as an inpatient constituted a reckless and/or wilful faith in its contractual relationships, and of the implied duty to exercise due care in the performance of its contractual obligations.

8. The Plaintiff further alleges that as a proximate result of the above described reckless, wilful and/or wanton conduct of the Defendant in tortiously breaching the implied duties of good faith in its dealings and of due care in the performance of its obligations under the contract, the Plaintiff sustained the injuries and damages as set forth in Paragraph 8 of the Fifth Cause of Action those injuries and damages being set forth and reincorporated by reference herein.

WHEREFORE, the Plaintiff demands judgment against the Defendants in the sum of FIVE MILLION ($5,000,000.00) DOLLARS as compensatory and punitive damages.

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CUNNINGHAM, BOUNDS, BYRD, YANCE & CROWDER
Attorneys for Plaintiffs

BY_____
JOSEPH M. BROWN, JR.

Plaintiffs respectfully demand a trial by jury.

BY_____
JOSEPH M. BROWN, JR.

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IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Civil Action No. CV-78-001614

MARGARET W. LAVOIE, *et al.*,

Plaintiffs,

-VS-

AETNA LIFE & CASUALTY COMPANY, INC., *et al.*,

Defendants

FOURTH AMENDED COMPLAINT

Come the Plaintiffs in the above styled cause and amend the complaint filed heretofore in this action by adding a Seventh and Eighth Cause of Action as follows, the Plaintiffs expressly reincorporated all of the allegations contained in the most recent complaint filed heretofore in this action:

SEVENTH CAUSE OF ACTION

The Plaintiff, Margaret W. Lavoie, alleges against the Defendants as follows:

1. The Plaintiff realleges all of the allegations contained in paragraphs one, two, three, four, five and six of the First Cause of Action and incorporates the same by reference herein.

7. The Plaintiff further alleges that the Defendant, Aetna, acting by and through its agents, servants or employees, who were working in concert one with the other, did conspire to defraud the Plaintiff out of the benefits to which she was entitled by various acts of trickery and deception and by intentionally misleading statements made to the Plaintiff during the course of the various handlings of the claim of the Plaintiff for medical benefits on the respective occasions when the claim was submitted and later resubmitted on several occasions to

the Defendant's group claims office for approval of the said medical benefits.

8. The Plaintiff further alleges that as a proximate con-

[1]*

sequence of the above described conspiracy of the Defendants to defraud her out of the benefits to which she was entitled, she was caused to suffer the injuries and damages as set forth in paragraph nine of the Second Cause of Action, those injuries and damages being set forth and incorporated by reference herein.

WHEREFORE, the Plaintiff demands judgement against the Defendants in the sum of FIVE MILLION ($5,000,000.00) DOLLARS plus costs as compensatory and punitive damages.

EIGHTH CAUSE OF ACTION

The Plaintiff Roger J. Lavoie, Sr., alleges against the Defendants as follows:

1. The Plaintiff realleges all of the allegations contained in paragraphs one, two, three, four, five, six, seven and eight of the Seventh Cause of Action and incorporates the same by reference herein.

WHEREFORE, the Plaintiff demands judgement against the Defendants in the sum of FIVE MILLION ($5,000,000.00) DOLLARS plus costs as compensatory and punitive damages.

CUNNINGHAM, BOUNDS, BYRD,
YANCE & CROWDER
Attorneys for Plaintiffs

BY:_____
JOSEPH M. BROWN, JR.

Plaintiffs respectfully demand a trial by jury.

BY:_____
JOSEPH M. BROWN, JR.

*Page no. of record on third appeal of case to Supreme Court of Alabama.

AFFIDAVIT

This is to certify that the attached copy of Group Policy No. GC 321431 is a true and correct copy of the Group Insurance contract issued by the Aetna Life Insurance Company to City of Mobile.

AETNA LIFE INSURANCE COMPANY

By _____, Sr. Suit Supt.
John G. McTigue
Group Claim Department

State of Connecticut)
)ss:
County of Hartford)

On this 23d day of October, 1978, personally appeared John G. McTigue to me known to be the person who signed the foregoing statement, and acknowledged the same to be his free act and deed.

SEAL:

_____
Notary Public

My Commission Expires March 31, 1982

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*Page no. of record on third appeal of case to Supreme Court of Alabama.

AETNA LIFE INSURANCE COMPANY
HARTFORD, CONNECTICUT

(Herein called the Insurance Company)

Group Policy No.: GC-321431

Policy Delivered in: Alabama
(State or other Jurisdiction)

Policyholder: CITY OF MOBILE

Policy Signed: July 17, 1967

To Take Effect: February 1, 1967

This policy is a contract between the Policholder and the Insurance Company and shall be construed in accordance with the law of the jurisdiction in which it is delivered.

In consideration of the payment by the Policyholder of premiums in the amounts and at the times hereinafter provided, the Insurance Company hereby agrees with the Policyholder, subject to the terms appearing on this and the following pages of this policy (including, if any, the riders, endorsements, and amendments, to this policy which are signed by the Insurance Company), to pay benefits in accordance with the terms of this policy. The obligations and the rights of all persons under this policy shall be determined in accordance with the terms of this policy.

In witness whereof the Insurance Company has signed this policy at Hartford, Connecticut.

Secretary *President*

Registrar

GROUP INSURANCE POLICY

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* * * *

321431

Article II—BENEFITS (Continued)

EXCLUSIONS, LIMITATIONS, AND PROVISIONS APPLICABLE TO TITLE MMEB (Continued)

If, at any time, the Maximum Benefit under this Title is increased and if on the date of any such increase (each such date shall hereinafter be referred to as the "increase date") the covered family member is disabled, the Maximum Benefit of such family member shall, until he ceases to be disabled, be limited to the unused portion of the family member's Maximum Benefit as of the day immediately preceding such increase date.

Note: The term "disabled," as used in the preceding paragraph, means, with respect to the employee, that the employee is both disabled (i.e., ill or injured) and away from work, and, with respect to the dependent, that the dependent is confined, by reason of disease or injury, at home, in a hospital, or elsewhere or that the dependent has been confined in a hospital at any time during the thirty-one day period immediately preceding the increase date. An employee shall be deemed to have ceased to be disabled on the date the employee returns to work on a full-time basis. A dependent shall be deemed to have ceased to be disabled on the earlier to occur of

(a) the end of a thirty-one day period during which there has been no confinement of any kind, and

(b) the date the Insurance Company is furnished with evidence satisfactory to it that the dependent has completely recovered from all such diseases or injuries causing such confinement.

In the event a family member is not covered under this Title on the increase date solely because benefits aggregating the Maximum Benefit shall have been paid or accrued in respect of such family member prior to such increase date such family member shall again become covered under this Title on the increase date if he meets all of the following requirements on such date,

otherwise on the date he meets all of the following requirements:

(a) the employee makes written request to his Participant Employer for such insurance within thirty-one days following the increase date; and

(b) the family member is not "disabled," as defined above; and

(c) the employee is insured under this Title with respect to all other eligible family members.

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321431

Article II—BENEFITS (Continued)

TITLE MMEB—MAJOR MEDICAL EXPENSES BENEFITS (Continued)

Extension of Benefits

If insurance with respect to a family member terminates while he is totally disabled and before benefits aggregating his Maximum Benefit become payable with respect to him, any benefits provided under this Title for that family member, but for no other family member, will continue to be available as to expenses incurred during the uninterrupted continuance of such total disability but not beyond the period of twelve months immediately following such termination of insurance and in no event beyond the date the family member becomes insured under any other group policy, whether issued by the Insurance Company or any other insurer, for benefits of a type similar to that provided for in this Title. The words "totally disabled" and "total disability" mean that the family member, if an employee, is prevented, solely because of a non-occupational injury or non-occupational disease, from engaging in his regular or customary occupation and is performing no work of any kind for compensation or profit, or if a dependent, is prevented, solely because of a non-occupational injury or non-occupational disease, from engaging in substantially all of the normal activities of a person of like age and sex in good health.

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321431

Article II—BENEFITS

EXCLUSIONS, LIMITATIONS, AND PROVISIONS APPLICABLE TO ALL TITLES UNDER ARTICLE II

Extension of Benefits: If insurance with respect to a family member under one or more of the Titles under Article II (except Titles ADDC, WBC, MMEB, CDEB, PEB, and AEB, if included in this policy) terminates while he is totally disabled, any benefit provided under such Title for that family member, but for no other family member, will continue to be available as to expenses incurred during the uninterrupted continuance of such total disability but not beyond a period of three months following the date such termination of insurance occurs. Expenses in respect of which benefits are payable under Title HEB, if included in this policy, will be deemed to be incurred within such three months period if the hospital confinement commenced within such period. The words "totally disabled" and "total disability" mean, for the purposes of this paragraph, that the family member, if an employee, is prevented, solely because of injury or disease, from engaging in his regular or customary occupation and is performing no work of any kind for compensation, or if a dependent, is prevented, solely because of injury or disease, from engaging in substantially all of the normal activities of a person of like age and sex in good health.

No insurance is afforded under any Title of Article II as to charges

(1) that would not have been made if no insurance existed or that no individual with respect to whom insurance under such Title relates is legally obliged to pay; or

(2) for services or suplies which are furnished or paid for, or with respect to which benefits are provided, under any law of a government (national or otherwise) by reason of the past or present service of any person in the armed forces of a government; or

(3) for services or supplies, other than those referred to in item (2) above, which are paid for, or with respect to which benefits are provided, under any law of a gov-

ernment (national or otherwise) except where such payments are made or such benefits are provided under a plan specifically established by a government for its own civilian employees and their dependents; or

(4) in connection with any hospital confinement or any surgical, medical, or other treatment, services, or supplies which are not recommended and approved by a physician who is attending the covered family member; or

(5) for care, treatment, services or supplies which are not necessary for the treatment of the injury or disease concerned nor to the extent that any charges for care, treatment, services or supplies are unreasonable; or

(6) caused or contributed to by, or as a consequence of, pregnancy or resulting childbirth, miscarriage or abortion; except to the extent, if any, that benefits are specifically provided therefor under the provisions of any title of Article II of this policy;

and before determining benefits under any Title, the amount of any such charges shall be deducted from the family member's expenses which are covered under such Title and from his Allowable Expenses (as hereinafter defined).

If any law of the jurisdiction in which this policy is delivered prohibits or restricts the application of item (2) or (3) above as to a facility owned or operated by such jurisdiction or by any of its political subdivisions, said items (2) and (3) shall be applicable only to the extent permitted by such law.

No benefits are payable under this policy to the extent that the provision of such benefits is prohibited by any applicable law of the jurisdiction in which the individual resides at the time the claim is incurred.

321431

Article II—BENEFITS (Continued)

EXCLUSIONS, LIMITATIONS AND PROVISIONS APPLICABLE TO ALL TITLES UNDER ARTICLE II (Continued)

No insurance is afforded under any Title of Article II as to charges for custodial care; and before determining benefits under any Title, the amount of any such charges shall be deducted from the family member's expenses which are covered under such Title and from his Allowable Expenses (as hereinafter defined).

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Article II—BENEFITS (Continued)

EXCLUSIONS, LIMITATIONS, AND PROVISIONS APPLICABLE TO ALL TITLES UNDER ARTICLE II (Continued)

Provision For Co-ordination Of Benefits Under This Policy With Other Benefits

A. Benefits Subject To This Provision:

All of the benefits provided under this Article II (except those provided under Titles ADDC and WBC, if included) are subject to this provision.

B. Definitions

(1) "Plan" means any plan providing benefits or services for or by reason of medical or dental care or treatment, which benefits or services are provided by (a) group insurance or any other arrangement of coverage for individuals in a group whether on an insured or uninsured basis or (b) automobile reparations (no-fault) insurance required under any law of a government and provided through arrangements other than those described in (a) but only to the extent of benefits required under such no-fault law.

The term "Plan" shall be construed separately with respect to each policy, contract, or other arrangement which reserves the right to take the benefits or services of other Plans into consideration in determining its benefits and that portion which does not.

(2) "This Plan" means those portions of this policy which provide the benefits that are subject to this provision.

(3) "Allowable Expense" means any necessary, reasonable, and customary item of expense at least a portion of which is covered under at least one of the Plans covering the person for whom claim is made. When a Plan provides benefits in the form of services rather than cash payments, the reasonable cash value of each service rendered shall be deemed to be both an Allowable Expense and a benefit paid.

(4) "Claim Determination Period" means calendar year, but if a person is not eligible for benefits under this Plan during all of a celandar year, then the Claim Determination Period for such person as to that year shall be the total period thereof during which he was eligible for benefits.

C. Effect on Benefits

(1) This provisioin shall apply in determining the benefits as to a person covered under this Plan for any Claim Determination Period if, for the Allowable Expenses incurred as to such person during such Claim Determination Perioid, the sum of

(a) the benefits that would be payable under this Plan in the absence of this provision, and

(b) the benefits that would be payable under all other Plans in the absence therein of provisions of similar purpose to this provision

would exceed such Allowable Expenses.

Article II—BENEFITS (Continued)

EXCLUSIONS, LIMITATIONS, AND PROVISIONS APPLICABLE TO ALL TITLES UNDER ARTICLE II (Continued)

Provision For Co-ordination Of Benefits Under This Policy With Other Benefits (Continued)

C. Effect on Benefits (Continued)

(2) As to any Claim Determination Period with respect to which this provisioin is applicable, the benefits that would be payable under this Plan in the absence of this provision for the Allowable Expenses incurred as to such person during such Claim Determination Period shall be reduced to the extent necessary so that the sum of such reduced benefits and all the benefits payable for such Allowable Expenses under all other Plans, except as provided in item (3) of this section C, shall not exceed the total of such Allowable Expenses. Benefits payable under another Plan include the benefits that would have been payable had claim been duly made therefor.

(3) If

(a) another Plan which is involved in item (2) of this section C and which contains a provision co-ordinating its benefits with those of this Plan would, according to its rules, determine its benefits after the benefits of this Plan have been determined, and

(b) the rules set forth in item (4) of this section C would require this Plan to determine its benefits before such other Plan,

then the benefits of such other Plan will be ignored for the purposes of determining the benefits under this Plan.

(4) For the purposes of item (3) of this section C, the rules establishing the order of benefit determination are:

(a) The benefits of a Plan which covers the person on whose expenses claim is based other than as a dependent shall be determined before the benefits of a Plan which covers such person as a dependent;

(b) The benefits of a Plan which covers the person on whose expenses claim is based as a dependent of a male person shall be determined before the benefits of a Plan which covers such person as a dependent of a female person;

(c) When rules (a) and (b) do not establish an order of benefit determination, the benefits of a Plan which has covered the person on whose expenses claim is based for the longer period of time shall be determined before the benefits of a Plan which has covered such person the shorter period of time.

(5) When this provision operates to reduce the total amount of benefits otherwise payable as to a person covered under this Plan during any Claim Determination Period, each benefit that would be payable in the absence of this provision shall be reduced proportionately, and such reduced amount shall be charged against any applicable benefit limit of this Plan.

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Article II—BENEFITS (Continued)

EXCLUSIONS, LIMITATIONS, AND PROVISIONS APPLICABLE TO ALL TITLES UNDER ARTICLE II (Continued)

Provision For Co-ordination Of Benefits Under This Policy With Other Benefits (Continued)

D. Right to Receive and Release Necessary Information

For the purposes of determining the applicability of and implementing the terms of this provision of this Plan or any provision of similar purpose of any other Plan, the Insurance Company may, without the consent of or notice to any person, release to or obtain from any other insurance company or other organization or person any infor-

mation, with respect to any person, which the Insurance Company deems to be necessary for such purposes. Any person claiming benefits under this Plan shall furnish to the Insurance Company such information as may be necessary to implement this provision.

E. Facility of Payment

Whenever payments which should have been made under this Plan in accordance with this provision have been made under any other Plans, the Insurance Company shall have the right, exercisable alone and in its sole discretion, to pay over to any organizations making such other payments any amounts it shall determine to be warranted in order to satisfy the intent of this provision, and amounts so paid shall be deemed to be benefits paid under this Plan and, to the extent of such payments, the Insurance Company shall be fully discharged from liability under this Plan.

F. Right of Recovery

Whenever payments have been made by the Insurance Company with respect to Allowable Expenses in a total amount which is, at any time, in excess of the maximum amount of payment necessary at that time to satisfy the intent of this provision, the Insurance Company shall have the right to recover such payments, to the extent of such excess, from among one or more of the following, as the Insurance Company shall determine: any persons to or for or with respect to whom such payments were made, any other insurance companies, any other organizations.

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* * * *

Article IV—PREMIUMS

Section 1. Premium Rates

The premium rates are as follows, but are subject to change as hereinafter provided: The premium rates shown are for a period of one month.

Title ADDC—Premium per $1,000 of Principal Sum: $.06 (Currently subject to a 13% reduction)

	*Premium Per Employee**	
	Employee Coverage	*Dependent Coverage*
Title HEB	$4.83	$10.19
Title SEB	.94	2.94
Title IHMEB	.31	.52
Title LXEB	.53	.71
Title MMEB	.94	1.40

*(Currently subject to a 14% reduction)

Section 2. Premium Calculations and Experience Rating

The premium due under this policy on any premium-due date shall be the sum of the premium charges for the insurance provided under the Titles then forming a part of this policy. The premium charges for the insurance under any such Title shall be calculated at the Premium Rates specified above, subject to such reductions or increases as the Insurance Company shall determine to be warranted by experience or by reason of any change in factors bearing on the risk assumed. Each reduction or increase in any premium rate shall be made by written notification to the Policyholder by the Insurance Company.

No experience reduction or increase in premium rates shall become effective less than twelve months after the effective date of this policy.

As of the end of any policy year the Insurance Company may declare an experience credit in such amount as the Insurance Company shall determine. The amount of each experience credit declared by the Insurance Company shall be refunded to the Policyholder, or upon request by the Policyholder, a part or all of the experience credit shall be applied against the payment of any premium or premiums.

Article IV—PREMIUMS (Continued)

Section 2. Premium Calculations and Experience Rating (Continued)

If at any time the aggregate of employee contributions heretofore made for group insurance shall exceed the aggregate of premiums theretofore paid for group insurance (after giving effect to any experience credits allowed the Policyholder), such excess shall be applied by the Policyholder for the sole benefit of employees, but the Insurance Company shall not be obliged to see to the application of any such excess.

If premiums are payable monthly, any insurance becoming effective shall, except as hereafter provided, be charged for from the first day of the policy month coinciding with or next following the date the insurance takes effect, and premium charges for any insurance terminated shall cease as of the first day of the policy month coinciding with or next following the date the insurance terminates. If premiums are payable quarterly, semi-annually, or annually, premium charges or credits for a fraction of a premium-paying period required by the foregoing terms of this paragraph shall, except as hereinafter provided, be made on a pro-rata basis for the number of policy months between the date premium charges commence or cease and the end of the premium-paying period. If this policy is amended to provide additional insurance, or any increase in insurance, and if the effective date of such amendment is other than the first day of a premium-paying period, a pro-rata premium in respect of such insurance shall become due and payable as of such date, to cover the period beginning on that date and ending immediately prior to the commencement of the next premium-paying period.

Instead of the method of calculation of premiums above provided, premiums may be calculated by any method which produces approximately the same total amount of premiums and is mutually agreeable to the Insurance Company and the Policyholder.

Section 3. Premiums, How Payable

Premimiums shall be payable by the Policyholder in advance at the Home Office of the Insurance Company or to its authorized agent.

The first premium under this policy shall be due and payable as of the date of issue to cover the period beginning on that date and ending on the last day of the first policy month and thereafter premiums shall be due and payable on the first day of each policy month.

Section 4. Grace Period

A grace period of thirty-one days following the due-date shall be allowed the Policyholder for the payment of each premium.

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THE STATE OF ALABAMA . . . . . JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

82-416 &
82-1152

AETNA LIFE & CASUALTY CO., INC.

VS.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.

Appeals from Mobile Circuit Court

APPLICATION FOR REHEARING

The Appellant, Aetna Life & Casualty Company, Inc., through its undersigned counsel, hereby applies for Rehearing of the judgment of this Court entered December 7, 1984.

As grounds for said applications, the Appellant would show that the aforesaid opinion and judgment of this Cout erred in the following respects:

1. The majority improperly determined that the poverty of the plaintiff was relevant and material in this case.

2. The majority opionion relied on factual inaccuracies and omissions.

3. The majority improperly determined that the Appellant resorted to legal artifice to create a questions of fact.

4. The majority incorrectly relied on Dr. Swann's affidavit to support the conclusion that Dr. Swann never reviewed the letter reports from Mrs Lavoie's treating physician.

5. The majority improperly concluded that Dr. Swann first reviewed the medical records on April 28, 1977, as opposed to April 25, 1977.

6. The majority inproperly refused to remit grossly excessive punitive damages.

7. The majority incorrectly, without factual basis in the record, determined that Dr. Swann *never* reviewed either letter from Dr. Douglas.

8. The majority incorrectly applied the law and facts regarding the effect of the defendant's partial payment.

9. The majority has overruled over one hundred fifty years of legal precedence, i.e. that rule of law which precludes the trial judge from ruling on the credibility and weight of evidence received at trial.

RESPECTFULLY SUBMITTED:

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellant
3763 Professional Parkway
Mobile, AL 36609

BY:_____
PETER V. SINTZ

BY:_____
WILLIAM M. CUNNINGHAM, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th day of December, 1984 served a copy of the foregoing pleading on counsel for the

Appellees to this proceeding by mailing a copy of same by United States mail, properly addressed and first class postage prepaid as follows:

Hon. Joseph M. Brown, Jr.
Post Office Box 66705
Mobile, AL 36660

PETER V. SINTZ

THE STATE OF ALABAMA . . . . . JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1984-85

82-416 &
82-1152

AETNA LIFE INSURANCE COMPANY
VS.
MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.

Appeals from Mobile Circuit Court

AMENDMENT TO APPLICATION FOR REHEARING

The Appellant, Aetna Life Insurance Company, improperly referred to as Aetna Life & Casualty Company, Inc., in the Court's Opinion of December 7, 1984, through its undersigned

counsel, hereby amends its Application for Rehearing by adding the following ground:

10. The errors committed in the majority opinion have resulted in a violation of the Appellant's rights under the Constitution of the United States of America.

Respectfully submitted.

PETER V. SINTZ

WILLIAM M. CUNNINGHAM, JR.

OF COUNSEL:

Sintz, Pike, Campbell & Duke
3763 Professional Parkway
Mobile, Alabama, 36609

CERTIFICATION OF SERVICE

I do hereby certify that I have on this 28 day of December, 1984, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid.

PETER V. SINTZ

Hon. Joseph M. Brown, Jr.
Post Office Box 66705
Mobile, Alabama 36660

JA-53

IN THE

SUPREME COURT OF ALABAMA

No. 82-426

AETNA LIFE & CASUALTY CO., INC. a corporation,
Appellant,

-VS-

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

Appeal From the Circuit Court Thirteenth Judicial Circuit of Mobile County, Alabama

---

BRIEF OF APPELLEES

CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
POST OFFICE BOX 66705
MOBILE, ALABAMA 36660

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This is the third appeal of this case. On the previous appeals of the case, the plaintiff had (1) been dismissed on the pleadings under a 12(b)(6) motion filed by the defendant, Aetna, and, (2) been dismissed as a result of the Trial Court's granting of the defendant's motion for summary judgment [see *Lavoie vs. Aetna Life & Casualty Co., Inc.*, 374 So.2d 310 (Ala. 1979); *Lavoie vs. Aetna Life & Casualty Co., Inc.*, 405 So.2d 17 (Ala. 1981)]. On both occasions, this court reversed the judgment of the Trial Court and remanded the case to the Trial Court for further proceedings.

The case was tried to a jury in the Mobile County Circuit Court on November 1-4, 1982 before the Honorable Michael Zoghby. The case was submitted to the jury on counts alleging breach of contract and bad faith refusal to pay on the part of the defendant. (R. 456).

At the close of all the evidence, the Trial Court denied the defendant's motion for directed verdict on the bad faith claim, allowing the case to go to the jury on both the contract count and the bad faith count. (R. 561; see court's charge at R. 570, et seq.).

It was stipulated, prior to the submission of the case to the jury, that the maximum amount at issue on the contract claim was $1,650.22. (R. 566).

After deliberation, the jury returned a verdict on November 4, 1982 in the sum of $3,501,650.22. (R. 599).

Thereafter, on November 17, 1982, the defendant filed a motion for judgment notwithstanding the verdict, or, in the alternative, remittitur, or, in the alternative, for a new trial. (TR. 58). It is respectfully noted for the Supreme Court that the defendant's motion for new trial:

> a. assigns absolutely no trial error committed on the part of the trial judge during his conduct of the trial itself or in the court's charge to the jury;

b. raises absolutely no issue with regard to assignment number 4 concerning the wealth or poverty of a party in the lawsuit (see page iii of defendant's brief and argument);

c. raises only the issues of the sufficiency of the proof offered by the plaintiff at the trial of the case and the alleged excessiveness of the verdict in this case.

The post-trial motion noted hereinabove was submitted to the Trial Court on December 17, 1982. (TR. 63). Judge Zoghby denied all of the defendant's post-trial motions, including the motion for remittitur, on January 28, 1983. (TR. 64, 70). Thereafter, on February 10, 1983, the defendant filed its notice of appeal. (TR. 72).

STANDARD FOR REVIEW

"In Alabama, the verdict of a jury is presumed correct and this presumption of correctness of the jury's verdict is strengthened once the Trial Court has entertained and denied a motion for a new trial." *Cox vs. Herrington*, 416 So.2d 968 (Ala. 1982); *Cooper vs. Peturis*, 384 So.2d 1087 (Ala. 1980).

> "The power to set aside verdicts has been generally regarded in this country as inherent in courts organized upon the principals of common law, though in some states it is regulated by statute, enumerating the grounds upon which a motion for a new trial may be made . . . But, in exercising the power, the court should be careful not to infringe *the right of trial by jury*, and should bear in mind, that it is their exclusive province to determine the credibility of witnesses, to weigh the testimony, and find the facts. Being selected for their impartiality and qualification to judge facts, and unanimity of opinion and conclusion being required, their *verdicts are presumed to be correct*. It has been said that no ground of new trial is more carefully scrutinized or more rigidly limited, than the verdict is against the evidence - Hillard on new Trials, 339. The power should be exercised, *only*, when it affir-

matively appears that the substantial ends of justice require the examination of the facts by another jury. *If these be the principles by which the Trial Court should be governed, they apply with much more force to the exercise of the power by an Appellate Court.* When the presiding judge refuses to grant a new trial, the presumption in favor of the correctness of the verdict is thereby strengthened . . ." *Cobb vs. Malone and Collins*, 92 Ala. at 633, 9 So. at 739 (1890) (Emphasis added).

"In reviewing the correctness of a jury verdict, this court must review the record in a light most favorable to the appellee." *Cooper vs. Peturis*, 384 So.2d at 1088.

STATEMENT OF THE FACTS

The plaintiffs, Margaret W. and Roger J. Lavoie, Sr., are husband and wife. On February 3, 1977, Mrs. Lavoie, an insured beneficiary within the terms of a group policy of health and medical insurance issued by the defendant, Aetna, entered the Mobile Infirmary to undergo a series of tests which had been prescribed by her physician, Dr. John B. Douglas. (R. 33, 56-57). Mr. Lavoie, a totally disabled, retired police officer with the City of Mobile, was likewise an insured beneficiary under the same policy, which had been issued to the City of Mobile as the policy holder. (R. 32, 56-57). The policy was in full force and effect at the time of Mrs. Lavoie's hospitalization. (R. 57, 109). Incident to Mrs. Lavoie's hospitalization, between February 3 and February 26, 1977, the plaintiffs incurred a total charge from the Mobile Infirmary of some $3,028.25 (see Plaintiffs' Exhibits 1 and 2, respectively at TR. 79-80). Aetna paid a portion of the total charges incurred by the plaintiffs prior to the institution of litigation, and it was stipulated by counsel that the maximum amount of the benefits in question under the contract claim in this case was a total of some $1,650.22 (see stipulation at R. 566).

For purposes of clarification, the court should carefully note that the exhibits marked Plaintiffs' Exhibit 3-5 at the trial of the case and appearing in this transcript are defined as follows:

*** PLAINTIFFS' EXHIBIT 3 ***

AETNA'S *HOME OFFICE ("HO") FILE FROM THE HARTFORD, HOME OFFICE*

(Identified at R. 114 by Ms. Brenda Harris, an Aetna senior claims processor, and appearing at TR. 81-100).

*** PLAINTIFFS' EXHIBITS 4 AND 5 ***

AETNA'S *MOBILE, ALABAMA FILE*

(Identified by Ms. Harris at R. 115). (Plaintiffs' Exhibit 4 appears in the record at TR. 101-132. Plaintiffs' Exhibit 5 appears in the record at TR. 133-167).

It is important for the court to recognize that the exhibits identified hereinabove originated from separate files maintained by Aetna in their Hartford and Mobile Claims Offices, respectively. These documents are Aetna's own files maintained by them during the course of the handling of Mrs. Lavoie's claim. The documents are Aetna's. The places where certain documents appear *and fail to appear* is critical to the bad faith which occurred in this case.

THE SUFFICIENCY OF THE EVIDENCE
PART I

Brenda Harris, an Aetna senior claims processor in Mobile, Alabama with 12 years experience in claims handling, was the first Aetna employee to examine the Lavoie hospitalization when the bill came in and was primarily responsible for the handling of Mrs. Lavoie's claim in the Mobile office. (R. 73-77, 88). Ms. Harris testified that Mrs. Lavoie's admitting diagnosis, ulcerative colitis, would have qualified her for coverage under the group medical policy that had been underwritten by Aetna, and that the policy itself was admittedly in full force and effect at the time of the admission to the Mobile Infirmary. (R. 109). The only reason for denial of the claim submitted by the Lavoies was set forth in the letter dated June 3, 1977 (R. 110-11; TR. 123).

Prior to this, on April 5, 1977, Brenda Harris, via inter-office communication dated April 5, 1977 and found at TR. 126, forwarded certain medical records to Jean Becker, the Home Office senior claims examiner in Hartford, for review. The records submitted to the Home Office were identified by Dr. Bernard Swan, a member of the Home Office Medical Department (and the only physician who ever reviewed the Lavoie claim for Aetna prior to its denial) as being the admitting sheet diagnosis, the admission history and physical, the doctor's orders, the discharge summary and extraneous information such as lab reports and "things like that." (R. 188-189. 476). The nurses' notes, which Dr. Swan volunteered were "an integral part of the chart", were not supplied at that time and were not obtained until April of 1978, a year later. (R. 191, 170. TR. 111). Ms. Harris, the senior claims adjustor from Mobile, while acknowledging that the nurses' notes were not a part of the information originally sent to the Home Office at the time of the first denial, testified that the significance of the nurses' notes was in the fact that they contained daily information on what was done to the patient, what medications were administered to the patient, and whether or not a patient was experiencing pain or physical illness on a given particular date. (R. 148-149). Tom Hutton, presently an assistant superintendent in the Claim Department and a senior claims examiner at the time of his review of the Lavoie file in 1977, likewise testified that he considered the nurses' notes "to be a significant portion of any medical file . . . much more so from a physician's standpoint than a nurses' standpoint." (R. 460, 485-486). The patient's progress notes were also omitted from the information which was sent to the Home Office during the first review of the Lavoie claim (see Harris at R. 152). Mr. Hutton likewise acknowledged the significance of the patient's progress notes in a hospital file, and noted that, procedurally, if he saw certain of the entries that were actually on Mrs. Lavoie's progress chart during his review of a claim he would, recognizing that he is not medically qualified to make a decision as to whether a person's hospitalization would be reasonable in light of such information, go first through his Medical Department for a medical

doctor's review prior to making any denial of that claim. (R. 486-489).

With this answer in mind, the court should note carefully that there were a total of *four reviews and four separate denials of the Lavoie claim by the Aetna Home Office claims staff.* At *no time* did Aetna *ever* obtain Mrs. Lavoie's progress records and progress notes during their respective reviews and denials of the subject claim (compare carefully Aetna's Mobile Office file and Aetna's Home Office file - Plaintiffs' Exhibits 3-5 at TR. 81-167 - with the actual subpoenaed hospital records from Mobile Infirmary - Plaintiffs' Exhibit 6 at TR. 168-239 - and especially the *progress records themselves* at TR. 183-185).

Subsequent to the submission of the Lavoie material to the Home Office of Aetna, the Home Office responded on *April 27, 1977* with directions to the Mobile office to deny payment for the room and board charges as well as for certain tests that had been administered to Mrs. Lavoie during her hospitalization. (TR. 85). This document recited that the file had been reviewed with:

> "a member of the Medical Department . . ."

and stated further that:

> "on the basis of *limited* information submitted, this confinement does not appear to have been medically necessary. We feel this patient *could* have been evaluated and treated on an out patient basis." (Emphasis added) (TR. 85).

In addition to the denial of in-patient room and board charges, the April 27, 1977 inter-office communication (IOC) also noted that three tests - the CAT scan, the EEG, and the EKG - that were administered during the confinement were also being denied, purportedly because the procedures were not "usual and customary for the diagnoses given." (R. 85)

It is important to note that, according to the testimony, the Home Office "Medical Department" of Aetna was purportedly

the primary precipitating factor in the denial of the Lavoie claim (see entire testimony of Dr. Swan and Jean Becker at R. 187 et seq. and R. 540 et seq.). Indeed, Ms. Becker noted that, in her experience as a group claims representative in the field, the procedure for handling such group medical claims was to refer them to the senior claims examiner at the Home Office who in turn would refer the claim to "the medical department." (R. 541-542). The senior claims examiner in the local office would have no direct contact with the "medical department." (R. 155, 541).

The obvious reason for having the "Medical Department" of the Home Office as the final authority in deciding whether to pay or deny in-patient hospital claims was shown in the testimony of Mr. Hutton and Dr. Swan. Under cross-examination, Mr. Hutton admitted that he was not medically qualified to render an opinion on medical matters and "that's why we have our medical department." (R. 474). Dr. Swan testified that he, as an associate medical director, works in the claim department and reviews "complicated problems *which require a medical opinion.*" (R. 187).

Thus, with the "Home Office Medical Department" being the primary factor in the denial of the Lavoie claim, it is necessary to define from the evidence exactly what the "Home Office Medical Department" consisted of. The term itself seems to be self-defining, and would appear to most people to mean exactly what it says, i.e., a department consisting of medical doctors assigned to the review of "complicated medical problems which require a medical opinion." (R. 187). However, due to some rather interesting developments during the discovery phase of this trial, and Aetna's attempts to explain their way out of glaring inconsistencies at trial, a more exacting examination of this term is called for.

Perhaps the most revealing document in the Aetna file in this regard is the April 27, 1977 inter-office communication from Jean Becker to Brenda Harris. (TR. 85). There, Ms. Becker, the senior claims examiner in Hartford, references review of

the subject file "with a member of the Medical Department." Obviously, Ms. Becker, as a part of the "claims staff", considered the "Medical Department" to be an entity of which she was not a part. The reference to "a member of the Medical Department" is obviously a reference to Dr. Swan, and this fact is borne out by Dr. Swan's own testimony. (R. 187 et seq.). Furthermore, Ms. Becker's own testimony bears out the fact that her reference to the "Medical Department" was a direct reference to "the doctor." (R. 550). Clearly, Tom Hutton, the senior analyst in Hartford, according to Ms. Becker, was not a member of the "Medical Department." (R. 550).

Likewise, Dr. Swan testified that the "Claim Medical Department" was comprised of six physicians. (R. 188). Again from the testimony of Ms. Becker, we find that it was the customary procedure at Aetna for the various regional claims offices to refer claims to the senior examiners in the Home Office who in turn referred the claims to the "Medical Department" for review (see testimony of Dr. Swan at R. 187, et seq.).

The court will also note the testimony of Ms. Harris at R. 91-93 where she acknowledges her desposition testimony (*given in January, 1980*) which unequivocably drew a distinction between Tom Hutton, the senior claims examiner at the Home Office, and the "Home Office Medical Department." (R. 91-92). Ms. Harris admitted at trial that not one time in her entire deposition did she ever tell plaintiffs' counsel that Tom Hutton and the "Medical Department" at Hartford were one and the same thing to her. (R. 92). Ms. Harris further acknowledged her deposition testimony as containing the following exchange:

> "Q: Outside of a direct inquiry from the Mobile office to the medical department of Aetna in Hartford, would anyone else have been involved in the denial of this claim?
>
> A: Now, the medical, the Mobile office *does not go directly to the medical department.* We go to our claims examiner, which is who we went to in this case." (Emphasis added).

(R. 93).

At R. 99 the following exchange took place between plaintiffs' counsel and Ms. Harris:

> "Q: Do you recognize the medical department as being *physicians*, don't you?
>
> A: I do now, yes, sir.
>
> Q: No ma'am, no. At the time you gave this deposition before you gave your affidavit, at the time you gave your deposition.
>
> A: At the time I gave my deposition I did, yes, sir.
>
> Q: O.k. and before you gave the affidavit, right?
>
> A: Right."

(Emphasis added).

With these excerpts for the term "Medical Department" as a basic, definitional premise, it is interesting to note the affidavit of Brenda Gail Harris which was filed by the defendant, Aetna, in support of its initial motion for summary judgment (see Plaintiffs' Exhibit 7 at TR. 240). This affidavit was read into evidence at R. 145. It will be noted that the affidavit itself was dated February 28, 1980, some thirty-five days after Ms. Harris' deposition was taken. (R. 144). Although Ms. Harris acknowledged that she had had no problem at all in January of 1980, when her deposition was taken in this case, with distinguishing "claims examiners" from the "Medical Department" of Aetna, she apparently developed quite a bit of difficulty by February 28, 1980 when her affidavit was given. (R. 144). In that sworn affidavit, Ms. Harris preliminarily remarks that:

> "I understand that an ambiguity may exist concerning my letter of December 23, 1977, to Thomas J. Stein. I stated in that letter that I had again checked with our Medical Department on this matter and they have advised that

based on the information available to us, we must continue to deny benefits for the room and board." (TR. 240).

Thereafter, in the same affidavit, Ms. Harris conveniently notes that she "customarily" refers to the senior claims examiner in Hartford as "our Medical Department" thus attempting to state under oath that now (February 28, 1980), some thirty-five days after her deposition was taken wherein she clearly, definitively and voluntarily distinguished between "claims examiners" and "Medical Department", she uses the term "Medical Department" interchangeably to connote senior claims examiners and the medical doctors in Hartford. It is respectfully submitted that this affidavit was nothing whatsoever more than a futile attempt by Aetna to cover up a glaring inconsistency and, indeed, a fraud committed upon the Lavoies. It marks merely one in a long series of attempts by the defendant, Aetna, to explain away and cover up several actual acts of fraud, conspiracy and direct lying that had been perpetrated upon the Lavoies during the course of Aetna's handling of the claim. The jury could, and rightfully did, arrive at such a conclusion based upon the following additional evidence taken at the trial.

PART II

On November 4, 1977, Dr. John Douglas, Mrs. Lavoie's treating physician, wrote a very detailed medical report to Thomas J. Stein, Mrs. Lavoie's attorney at that time, explaining with particularity exactly why Mrs. Lavoie required a twenty-three day period of confinement and why the tests that were denied by Aetna were relevant and necessary for her treatment at the time they were prescribed (see TR. 118-120). Ms. Harris received Dr. Douglas' letter as an enclosure in a letter from attorney Stein to Aetna dated November 8, 1977 (see TR. 118-119). The court will especially note the handwriting which appears at TR. 118 on the face of attorney Stein's letter to Aetna. This handwriting, it is respectfully submitted, is reflective of the exact conversation which occurred between Ms. Harris and Tom Hutton, the senior claims examiner at

Hartford, when she called him on November 9, 1977. That telephone conversation, as testified by Ms. Harris, revealed the following: Ms. Harris called Mr. Hutton on November 9, 1977 telling him that she had additional information concerning the Lavoie file. (R. 156). Prior to that date she had had no dealings with him on this particular file. (R. 156). To the best that she recalled, Mr. Hutton himself answered his own private line on that date. (R. 156). She informed him at that time that she had some additional information. (R. 157). After briefing him over the phone as to what the file was about, she read the letter from the attorney *and from Dr. Douglas*. (R. 157). After she read the doctor's letter to him, without repeating any portion of the letter, with *no medical doctor on the telephone with him*, and having read the letter to him one time and one only, Mr. Hutton, *admittedly unqualified to render a medical decision* (see closely R. 473-474), instructed Ms. Harris to:

> "Maintain the denial. *If they act like they are going to file suit, send it back to me.*"

(R. 156-159) (Emphasis added)

Ms. Harris then wrote attorney Stein via letter dated November 14, 1977 maintaining the denial and implying the need for more information. (R. 160, TR. 117). Responding, attorney Stein again wrote Aetna on December 19, 1977 with yet another report from Dr. Douglas attempting to answer the insurer's questions regarding the treatment he rendered to Mrs. Lavoie. (R. 164, TR. 115-116). The next day, December 20, 1977, Ms. Harris again called Mr. Hutton. Once again, she dialed his direct number, and Mr. Hutton picked up the phone. Mr. Hutton did not get any medical doctor on the telephone with him at that time either. (R. 164). No one else was on the phone other than the two of them. (R. 164). At that time, she read Mr. Hutton the letter from Dr. Douglas, again reading it only one time, and repeating nothing to him. (R. 165). After reading the letter to him, Mr. Hutton, the *medically unqualified* claims adjustor from Hartford, with no further medical information, no consultation with any physician, and with-

out even so much as the nurses' notes or progress notes in front of him at that time, directed her to continue denying the benefits based on the information available, and directed her to write the denial letter of December 23, 1977. (R. 165, 473-474, 476, 485). In response to those directions from Mr. Hutton, Ms. Harris wrote to Mr. Stein, the lawyer representing the Lavoies, on December 23, 1977 telling the Lavoies:

> "I have again checked with our Medical Department on this matter, and they have advised that based on the information available to us, we must continue to deny any benefits for the room and board." (R. 165, TR. 114).

This is in the face of two medical reports indicating that Mrs. Lavoie was bleeding from the rectum, had flight of ideation and noted personality changes. The reports state that hospitalization was necessary to rule out organic and abdominal disease and also organic intracranial disease. (R. 252, 253).

When this letter was written to the Lavoies, directly implying and representing to them that *both* of Dr. Douglas' medical reports had been reviewed by medical doctors hired by Aetna for purposes of review of such claims, both Ms. Harris and Mr. Hutton nonetheless acknowledged that absolutely no medical doctor had ever reviewed either one of the two medical reports that had been submitted to Aetna by the Lavoies in hopes of having the claim approved and paid. (R. 165, 474-485).

It is respectfully submitted that the above referenced testimony, trial material and exhibits, reflects clearly that on two of the four separate and distinct denials of the Lavoie claim, Aetna literally violated all of their recognized principles and procedures for properly handling such claims - deliberately bypassing the Medical Department who was the only source of medically qualified information available to Aetna - and then deliberately, intentionally and recklessly representing to the Lavoies that their file had been reviewed by a "member of the Medical Department." Clearly the inference which can be drawn from this deliberate intentional, fraudulent and conspiratorial misconduct on the part of Aetna's claims adjustors is

that they, at every opportunity, attempted to run the Lavoies off with intentional misrepresentations that the claim had been reviewed by a "member of the Medical Department" while the truth was that it had never been reviewed on those two distinct submissions by any person who was medically qualified to render such a decision.

Bearing in mind Dr. Swan's recitation of the importance of having an actual member of the Medical Department—a physician—as the one to pass judgment on "complicated problems which require a medical opinion" (Dr. Swan at R. 187), Ms. Harris nonetheless admitted that, although she had written the Lovoies' attorney on December 23, 1977 reciting as fact that she had "again checked" with the "Medical Department" in regard to Dr. Douglas' letters, in actuality, she had, as of December 23, 1977, consulted *no* member of the Medical Department with regard to either of Dr. Douglas' letters and knew that to be a fact when she wrote the December 23, 1977 letter to Mr. Stein. (R. 164-165).

The significance of Dr. Douglas' medical reports was noted by both Ms. Harris and Dr. Swan. Ms. Harris testified that she recognized the importance of a treating physician's report to their Medical Department and responded to questioning along this line as follows:

> "Q: What is the importance of a doctor's report to the Medical Department?
>
> A: The Medical Department *has to* base their decision on what the doctor informs them.
>
> Q: And that's a hard and fast rule, isn't it?
>
> A: Yes, sir.
>
> Q: O.k., and the Medical Department has to review that doctor's report, isn't that right?
>
> A: Yes, sir.
>
> Q: No exceptions to that to your knowledge?

A: Not to my knowledge.

Q: You know that Mr. Hutton is not a medical doctor, don't you?

A: Yes, sir.

Q: Did you know it at the time that you called him on November 9, 1977?

A: I knew that he was not a doctor, yes.

Q: You knew that he was not a trained medical physician, correct?

A: Yes, sir."

(R. 155) (Emphasis added).

Likewise, Dr. Swan responded to questions concerning the significance of the doctor's medical reports. As noted hereinabove, Dr. Swan's job at Aetna's Home Office Medical Department was to "review complicated problems which *require* a medical opinion." (R. 187) (Emphasis added). Dr. Swan went on to volunteer the following under questioning by Aetna's own counsel:

"Q: Did you consider Dr. Douglas' letter?

A: Yes. I was thumbing through it to try—I was interested in reviewing the letter, whether that's responsive to your question.

Q: Yes, I was going to ask you. Did you pay attention to his letter? Did you read it?

A: Yes, I did. I think the *most important bit of information* we like to get in such cases is a narrative report from the treating physician. It's the *most logical source of information.*"

(R. 199) (Emphasis added).

PART III

The next aspect of Aetna's intentional and fraudulent efforts to deceive the Lovies revolved around the initial handling and denial of the Lavoie claim. It will be recalled from the matters set forth hereinabove that the initial request by the Mobile Office to The Hartford Group Claims Office for a review of the Lavoie file was made on April 5, 1977 (TR. 88), and The Hartford Claims Office responded on April 27, 1977 with its initial denial, Ms. Becker reciting therein that "this file has been reviewed with a member of the Medical Department." (TR. 124). However, a closer review of the evidence itself indicates that Dr. Swan, the only member of the Medical Department of Aetna who ever reviewed the Lavoie file, did *not* review the file material and records until April *28*, 1977, one day *after* the original denial was sent to Mobile (see TR. 87 and testimony of Tom Hutton at R. 495). Dr. Swan's own handwritten notes found in the Home Office file at TR. 87 clearly show that the first day he ever worked on the file was April 28, 1977. It must be borne in mind that Dr. Swan worked in the Group Claims Office on only one day per week. (R. 187). An examination of Plaintiffs' Exhibit 9, a 1977 calendar, indicates that April 28, 1977 fell on a Thursday. (TR. 245). So as to alleviate any question about the date on which Dr. Swan first reviewed the Lavoie file, counsel for plaintiff asked Mr. Hutton himself, who, as the claims analyst at Aetna for several years, was obviously familiar with Dr. Swan's handwriting to read from the above-referenced handwritten notes of Dr. Swan found at TR. 87. From that page, containing handwriting of both Ms. Becker and Dr. Swan, Mr. Hutton stated the date on the page in Dr. Swan's own handwriting is "4-28-77." (R. 495).

To further solidify plaintiffs' contention that the first day Dr. Swan ever looked at the Lavoie records was April 28, 1977, the court should note the handwritten memo of Mr. R. E. Mann, another Aetna senior claims processor who reviewed the file on July 25, 1978. (TR. 86). At sub-paragraph (b) of the section labeled "Comments", Mr. Mann notes that "(w)e reviewed *on 4/28/77* and denied coverage of some charges. . ." Obviously,

Mr. Mann's notation is in reference to Dr. Swan's handwritten notes dated 4-28-77 and located at TR. 87. This notation comes from a man that Dr. Swan himself recognized as having been in The Hartford Claims Office for several years and who was intimately familiar with Dr. Swan's work, having worked "a lot more than fifty claims per year during those years of his association with Mr. Mann. (R. 377-379). Even Ms. Becker, the only witness who testified live for Aetna regarding this critical date, admitted under cross-examination that "there was initially some confusion in my mind about two or three months ago when Mr. Sintz first asked me what the date was on that particular piece of paper." (R. 555). Obviously, two to three months before trial, after this case had been submitted to the Supreme Court on appeal on two previous occasions where the critical nature of this particular date had been manifest, the jury could rightfully conclude that Ms. Becker's testimony that the "28" was a "25" was a result of the fact that Aetna very well *knew* that her testimony to the contrary would be a bald-faced admission of the bad faith which occurred in this case. (R. 555).

The court should also carefully note on this issue *TR. 84*, another page acknowledged by Dr. Swan as his handwriting. At the end of the first paragraph on that page, the court will note the figures (305.9). A comparison of the "5" located at TR. 84 with what Aetna would have this court and the jury believe was a "5" located at TR. 87 should leave no doubt that the jury, like Mr. Hutton and Mr. Mann, rightfully concluded that Dr. Swan's review of this file had indeed been made on April 28, 1977, *the day after the denial had been rendered by Jean Becker.* The court is encouraged to review the number in question to see just how unbelievable Aetna's story is—"Oh what a tangled web we weave. ."

Viewing this evidence most favorably to the plaintiffs, the jury could rightfully conclude from the above that the tail was wagging the dog at Aetna's Home Office, with senior claims adjustors writing final denials and then later going to the medical staff for rubber stamp approval of their already-rendered decisions, all in violation of Aetna's own in-house pro-

cedure which required that medical claims be denied by a medical doctor. Bear in mind that Dr. Swan's own testimony, supra, indicated that he was contacted only on *complex cases requiring a medical opinion.* (R. 187). Yet the denial had already been made on this "complex case" without any medical opinion whatsoever when the initial denial was made on April 27, 1977.

From a legal standpoint, the above is extremely significant in that it is conclusive evidence that, at the time the first of the four denials was made of the Lavoies' claim, Aetna had *no legal justification for denial of the claim at all,* having established by their own testimony that a medical opinion is required in order to properly deny such a claim, and the evidence clearly and convincingly showing that such a medical opinion was *not obtained* prior to the denial itself having been issued.

Still further evidence of the tail wagging the dog in this matter comes from yet a closer review of Mr. Mann's above-referenced handwritten summary of the Home Office's fourth review of the Lavoie file, and a comparison of it with Dr. Swan's testimony on this point (see again TR. 86). A review of Mr. Mann's handwritten notes at TR. 86 will reveal that absolutely *no* mention is ever made by Mr. Mann of any new consultation with a physician in the Aetna Medical Department on the basis of the newly submitted information—the nurses' notes. Yet, without more, and *on July 25, 1978,* Mr. Mann has rendered his own opinion that the denial should be maintained. According to Dr. Swan, three days later—July 28, 1978—is the first time he ever looked at the newly submitted nurses' notes on this particular review of the file. (R. 210-212). Plaintiffs' Exhibit 24, which Dr. Swan acknowledged in his deposition was his own copy of the handwritten notes which he made on his second review, and which defense counsel diligently sought to keep out of evidence, clearly notes that Dr. Swan's review had taken place on July 28, 1978. (TR. 248). Even though Dr. Swan's review of 7-28-78 coincides with Mr. Mann's typewritten July 28, 1978 inter-office communication to Alice Murphy in Mobile (TR. 82), a comparison of the inter-office communication itself

with the handwritten notes of Mr. Mann and Dr. Swan shows without question that the denial itself is a mirror of Mr. Mann's opinions formulated on July 25, 1978 and not at all of Dr. Swan's, formulated some three days later (compare TR. 82 with TR. 84, 248 and 86).

It is also noted at this point that the July, 1978 calendar, admitted as Plaintiffs' Exhibit 10 and located at TR. 246, will reveal that July 28, 1978 fell on a Friday. It is inescapable that both the dates of April 28, 1977 and July 28, 1978 were of critical importance to the plaintiffs' proof of bad faith which occurred in this case. It is likewise imminently apparent that all of the data and arguments which plaintiffs advanced at the trial of this case had been advanced in the brief of the Appellant filed in this same action which was filed in the Supreme Court of Alabama on January 13, 1981. At no time did Aetna ever attempt to explain away these obvious inconsistencies by some direct testimony in regard to the day of the week that Dr. Swan worked in the Medical Department. Both Dr. Swan and Mr. Mann were conspicuously absent from the trial fo this case. There being no explanation at all from Aetna with regard to these glaring inconsistencies, the jury could, and rightfully did, conclude that there was no explanation for the inconsistencies, and that, indeed, the tail *was* wagging the dog at Aetna.

PART IV

For future reference in this brief on what will be evidence of yet another fraud of Aetna in this matter, the court should note at this point the specific absence in Mr. Mann's 7-25-78 handwritten review and in his July 28, 1978 IOC (inter-office communication) of any reference at all to either of Dr. Douglas' reports generated in November and December of 1977, respectively. (TR. 82, 86). Apparently, neither of these "most important" (R. 199) medical reports were reviewed in making the July, 1978 denial, yet it will be seen, infra, that Aetna now contends that July, 1978 is the first and only time Dr. Douglas' reports were ever reviewed by a member of the Medical Department prior to the filing of this lawsuit.

Mr. Hutton did not consider himself, as a senior claims adjustor, qualified to render a medical opinion. (R. 474). "That's why we have our Medical Department." (R. 474). Dr. Swan was consulted on "complicated problems which *require* a medical opinion." (R. 187). Ms. Harris stated unequivocably that "the Medical Department has to base their decision on what a doctor informs them (in his doctor's report)" and that this was a hard and fast rule at Aetna with no exceptions. (R. 155). Indeed, a review of the documents generated at Aetna note the significance of and necessity for the Medical Department's review by a statement in virtually every document generated by the Claims Department that "our Home Office medical staff has again review this claim."

Thus, the internal standard and procedure for properly reviewing claims having been established by Aetna itself, the jury could rightfully conclude that the Aetna *claims staff* was intentionally and repeatedly engaged in the violation of its own standards and procedures via making medical decisions on "complicated problems". rendering their denials, and then on some, but not all, occasions seeking support from the medical staff on the basis of "the limited information available" (see testimony of Brenda Harris, Tom Hutton, Dr. Swan and the numerous documents reflected in Plaintiffs' Exhibits 3 and 4).

Still further evidence of bad faith, actual fraud and conspiratorial misconduct in the handling of the Lavoie claim lies in the testimony and affidavit of Dr. Swan. As a starting premise, the court should carefully note and remember that nowhere in the "Home Office" file produced by Aetna initially at Brenda Harris' deposition and marked as Plaintiffs' Exhibit 3 at TR. 81-100, does there ever appear the two medical reports written by Dr. John B. Douglas, the treating physician. (*Please note carefully the absence of these documents at TR. 81-100*). This conclusion is supported by the testimony of Mr. Hutton who, although having testified in his deposition that the reports of Dr. Douglas were in the Home Office file, admitted at trial that they were, in fact, nowhere to be found in the Home Office file. (R. 484).

With the absence of the medical reports from the Home Office file as a proven, uncontested matter, the question then becomes whether the people who were charged with reviewing the file for approval or denial of a particular claim placed any significance upon the treating physician's reports. This question was answered directly and affirmatively by Dr. Swan:

> "A: . . . What I expect to see is a letter from the doctor, and I would say—I'm volunteering—probably 25% of the time when further information, a letter from the doctor comes, I will change my opinion and recommend coverage for a part of it.
>
> Q: Fine. So you consider then the letter from the doctor to be a very important part of it?
>
> A: I certainly do."

(R. 238-239).

> A: I think the *most important* bit of information we like to get in such cases is a narrative report from the treating physician. It's the *most logical* source of information."

(Dr. Swan at R. 199) (Emphasis added).

Against this backdrop, the court will recall from the evidence set forth hereinabove that not less than two of the four distinct denials of the Lavoies' claim were made by the Hartford claims staff following the submission of the "most important" information contained in Dr. Douglas' reports, and yet no Aetna employee even so much as *contends* that *any* member of the Medical Department *ever* reviewed Dr. Douglas' letters in November or December of 1977, when both of these documented denials were made (compare testimony of Brenda Harris at R. 156-165; testimony of Dr. Swan at R. 193-202; testimony of Mr. Hutton at R 473-485).

Most damning of all, however, is the fact that Dr. Swan, the one and only medical physician at Aetna who could have ever reviewed this "complicated medical matter" "which require(d) a medical opinion", and in direct contradiction to his previous

testimony given in this matter, admitted under oath via affidavit dated February 25, 1980, some one and one half years after the institution of this litigation and over two years after the reports were first submitted by the Lavoies to Aetna, that he had *never once* reviewed either of Dr. Douglas' "most important" letters prior to the date of his affidavit. A careful review of Dr. Swan's affidavit and testimony in this regard is called for.

The affidavit itself was submitted and filed by Aetna in support of a motion for summary judgment (see carefully R. 350 of this transcript where the court file was noted by plaintiffs' counsel as clearly reflecting that an unsigned copy of the affidavit had been previously filed with the court in this litigation). (See also Record on Appeal in *Lavoie vs. Aetna*, Supreme Court case number 80-149, the second appeal of this case where the summary judgment requested by the defendant, Aetna, had been granted).

The signed copy of the affidavit itself was marked as Plaintiffs' Exhibit 8 and is found at TR. 242-243. As pointed out hereinabove, earlier in his testimony, Dr. Swan had testified—though rather gingerly—to the following as regards his second review of the Lavoie file on July 28, 1978:

> "Q: (by Mr. Sintz) Did you also consider Dr. Douglas' letter?
>
> A: Yes. I was thumbing it to try—I was interested in reviewing the letter, whether that is responsive to your question.

(R. 199).

Counsel for plaintiffs would respectfully submit to the court that Dr. Swan's answer *was not* responsive to the question, and reflects the good doctor's attempts to dodge Aetna's own counsel's questioning of him in that respect.

The doctor went on, however, to say that Dr. Douglas' *letter* (he *never* mentions having received but one of the two letters, the 11-4-77 report—see R. 202) did not give him any new

information on which he could change his original opinion. (R200-201).

On cross-examination by plaintiffs' counsel, Dr. Swan was asked about the affidavit which was filed in February, 1980 in support of the defendant's motion for summary judgment. (R. 246). Initially, Dr. Swan denied signing it. (R. 246). Then defense counsel stated that he was not so sure that the original was signed either. (R. 246). Then the good doctor was not sure that he even recalled any such affidavit. (R. 247). He could not see his signature on what was being tendered to him at that time. (R. 247).

Then, after having the doctor sign a blank sheet of paper which was marked as Plaintiffs' Exhibit 34 and found at TR. 297, the original of the affidavit was produced from defense counsel's file and it bore the doctor's signature. (R. 255—see also Plaintiffs' Exhibit 8 at TR. 242). The good doctor then noted that, upon review of his sworn statement, there did not appear to be any reference to his "second review of the doctor's letter or anything." (R. 256). However, it was clear to Dr. Swan upon a closer look that the next to last paragraph of the affidavit stated very clearly that the Medical Department of Aetna had reviewed the file on at least two occasions and that he had reviewed the records twice as of the date he signed the affidavit. (R. 260). This obviously is a reference to his April 28, 1977 review and the July 28, 1978 review. Dr. Swan concludes the affidavit with the statement that, although he had reviewed the file on those two occasions prior to signing the affidavit in February of 1980, he had not yet ever seen any "further information from Dr. Douglas to justify the admission" nor had Dr. Douglas supplied him with such information (see carefully TR. 243, R. 260).

Dr. Swan concluded his testimony on this critical point by denying having sworn to the affidavit (R. 260), but then, after appropriate instructions from defense counsel, suddenly experienced a restoration of his memory and finally confirmed the

truth and correctness of the critical, next to last paragraph of the affidavit. (R. 260-261, TR. 243).

Counsel would respectfully draw the court's attention to R. 262 of Dr. Swan's testimony where, when questioned about his second review of the file in July of 1978, Dr. Swan responded that he was "not too sure" about that date. (R. 262).

Plaintiffs' counsel would again humbly request that the court carefully review Dr. Swan's testimony at R. 246-262 so as to fully grasp the impact and critical nature of the statements made therein.

In plain English, Dr. Swan's sworn affidavit of February, 1980 states unequivocably that, although he had reviewed the file on two occasions (April 28, 1977 and July 28, 1978), and had requested information from Dr. Douglas to substantiate the Lavoie claims, he simply had never seen the two "most important" reports from Dr. Douglas which had been in Aetna's hands for over two years and which he had just sworn falsely to having reviewed at the time of the July, 1978 denial.

PART V

Unbelievably, the evidence did not stop here. In the testimony of Tom Hutton, we find that Mr. Hutton, who had testified in his deposition that he had been the one to take the "most important" medical report to Dr. Swan for review in July, 1978, had never had any contact whatsoever with the file subsequent to his telephone conversations with Brenda Harris in December of 1977. Beginning at page 489, we would humbly ask the court to trace with us the critical nature of Mr. Hutton's testimony in this regard.

Mr. Hutton had testified on direct examination by Mr. Sintz that he had not reviewed the file ever again after December 10, 1977 and prior to the institution of this litigation. (R. 489). He acknowledged that he had not reviewed the file at all when the nurses' notes finally came in in April of 1978. Likewise, he did not review the file at all prior to July of 1978 when the last claims denial had been made by Aetna. (R. 489).

However, Mr. Hutton then was taken through the previous, sworn, under oath testimony that he had given in his deposition where Mr. Sintz had asked him questions regarding whether he had ever remembered seeing both of Dr. Douglas' letters to Aetna. His answer at the time of his deposition was "at a later date, I do" (recall seeing them). (R. 490). A recitation of Mr. Sintz' deposition questions and Mr. Hutton's answers continued:

> "Q: What did you do with them. Can you tell us when it was.
>
> A: Can I look through the files?
>
> Q: Yes if that will help you.
>
> A: Based on this claim file, it would have been around the time of Alice Murphy's referral, the original supervisor in Mobile.
>
> Q: And that is when.
>
> A: That was around July, '78."

Mr. Hutton's examination by Mr. Brown then continued for the jury as follows:

> "Q: So you testified in your deposition that you reviewed the file in July, '78, right sir?
>
> A: Yes.
>
> Q: But you testified today that you have *never* reviewed the file after December 20, 1977 is that right?
>
> A: Yes, that's right.
>
> Q: Did you also testify in your deposition that you also *had occasion to talk with Dr. Swan about the review that you made of the file in July of 1978*?
>
> A: I don't recall.
>
> Q: You don't recall. Talking about Ms. Murphy at page 16 (of his deposition)—'What did she do?' Your answer was

'She referred material up to me for review in addition to nurses' notes which we hadn't had earlier, which we hadn't had earlier for review. . .' Am I reading that right?

A: Yes you are.

Q: Right. (From the deposition)—'And did she resubmit the other portions of the file that she had sent up earlier?' And your answer was, 'I am not completely certain, but that is, but this is how they, the Mobile Claim Office handles claims.' Question: 'Then the file was resubmitted to you for some additional consideration' and your answer was 'Yes.' That would have been what information?

A: You want me to read that?

Q: You read it.

A: (Reading from his deposition)—'That would have been the hospital records which were available the first time around. In addition to the nurses' notes, the subsequent letters from the physician and any attorneys that have been involved. Also any letters from the Mobile Claim Office that would have been pertinent to our review.'

Q: Right sir. And we know, don't we, Mr. Hutton, that the nurses' notes didn't even come in until April of 1978, don't we?

A: Yes.

Q: Alright, and yet your last review had been when, December of '77, according to your testimony today?

A: Yes.

Q: And I asked you, and Mr. Sintz asked you the question (reading from his deposition): Question: (by Mr. Sintz) What did you do with that information. Did you submit to somebody else to look at.' And read for the jury your answer at that time. Read your answer to the jury what you did with that new information.

A: (reading from his deposition) 'Definitely that would have been submitted, because we did have additional medical information that would have been submitted.'

Q: Definitely would have been submitted, and who did you submit it to?

A: That would have been submitted to a member of the, of our Medical Department.

Q: And who do you remember that was?

A: I assume it was Dr. Swan.

Q: And did you have any discussion with Dr. Swan, Mr. Hutton?

A: I don't know. What does that say (indicating toward his deposition)?

Q: Well, let me ask you first. Did you have any discussion with Dr. Swan?

A: No.

Q: No? Do you remember that question being asked you in your deposition? That precise question? Sir?

A: Let' see.

Q: Well, what did you say when that precise question was asked to you by Mr. Sintz? (Reading from deposition question by Mr. Sintz) 'Did you have a discussion with Dr. Swan after he reviewed the file.' What was your answer?

A: (by Mr. Hutton from deposition) 'Yes.'

Q: (Mr. Brown reading from deposition) 'Yes, I did.'

A: O.k.

Q: Is that your answer?

A: Yes, it is.

Q: Do you have trouble with your memory, Mr. Hutton?

A: No.

Q: All of your testimony, then, in your deposition that you gave concerning seeing Dr. Douglas' reports in the spring of 1978 was false, is that true? Sir?"

(R. 491-493) (Emphasis added).

The court sustained defense counsel's objection to the question at this point. However, the answer was indelibly written on Mr. Hutton's face that he had indeed lied under oath in the prosecution of this case. Not only had he lied under oath, and admitted it from the witness stand, but he had lied as to the most critical element involved in this lawsuit, that being, his purportedly having been the individual claims examiner with Aetna who had discussed Dr. Douglas' two "most important" medical reports with Dr. Swan at the time of the second review. (Again note the absence of reference in Mr. Mann's July 25, 1978 handwritten summary to *any* contact with Dr. Swan—TR. 86).

The discovery of Mr. Hutton's admitted perjury provided the missing link in this conspiracy. Immediately, the reason for the absence of Dr. Douglas' two "most important" medical reports from Aetna's Home Office file became apparent:

THEY HAD NEVER BEEN THERE

Immediately, the reasons for Dr. Swan's affidavit to the effect that he had never seen the medical reports from Dr. Douglas was apparent:

THEY HAD NEVER BEEN THERE

Immediately, the reason Mr. Mann's July, 1978 handwriteen and typewritten summaries made no mention of Dr. Douglas' two "most important" medical reports became apparent:

THEY HAD NEVER BEEN THERE

The two "most important" medical reports of Dr. Douglas—the "most logical" source of information—the information upon

which Dr. Swan would change his mind in fully 25% of all cases wherein they were submitted—

HAD NEVER BEEN IN THE HOME OFFICE MEDICAL FILE OF THE AETNA
PART VI

Plaintiffs' counsel would respectfully note for this Honorable Court that the admitted false testimony and literal perjury that had been given by Tom Hutton in his deposition was testimony which was before this court in support of the defendant's motion for summary judgment which was granted by the Trial Court on the second appeal of this case. This admitted false testimony was utilized by the defendant, Aetna, in an attempt to avoid their just desserts under the facts of this case via summary judgment. This admitted false testimony of the senior claims examiner of the defendant who was responsible for two of the four bad faith denials in this case constitutes not only a fraud upon the Lavoies, but is also a fraud committed upon this court.

Such conduct should not be tolerated or condoned by this court's reversal or remititur in any respect of the just judgment rendered by the jury and approved by Judge Zoghby in this case.

ARGUMENT
I
THE EVIDENCE OF BAD FAITH WAS CLEARLY SUFFICIENT TO SUPPORT AN AWARD OF COMPENSATORY AND PUNITIVE DAMAGES IN FAVOR OF THE PLAINTIFFS.

It goes without saying that the tort of bad faith has advanced and developed quite a bit since the Lavoie case first appeared before this court in 1978. Since that time, this court has established the tort of bad faith in the case of *Chavers vs. National Fire & Casualty Co.*, 405 So.2d 1 (Ala. 1981), and has amplified, limited and generally defined the tort on several occasions since *Chavers*.

In *Chavers* this court held that an actionable tort for bad faith arises for an insurer's intentional refual to settle a direct claim where there is either:

> (1) no lawful basis for the denial of the claim coupled with actual knowledge of that fact, or
>
> (2) an intentional failure of the insurer to determine whether or not there was any lawful basis for such refusal.

The *Chavers* opinion further stated that circumstantial evidence as well as direct evidence is sufficient to prove the elements of the tort of bad faith. 405 So.2d at 7.

In the case of *Gulf Atlantic Life Insurance Co. vs. Barnes*, 405 So.2d 916 (Ala. 1981), the Supreme Court further defined the tort of bad faith. The court therein defined "bad faith" as the "intentional failure by an insurer to perform the duty implied by law of good faith and fair dealing." Id. at 924. After reciting the two-tiered test of *Chavers*, Justice Beatty went on to define exactly what those two tests meant:

> "No lawful basis' . . . means that the insurer lacks a legitimate or arguable reason for failing to pay the claim. . . . 'Coupled with actual knowledge of that fact' implies conscience doing of wrong. Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill-will." Id. at 924.

With regard to the second tier of the test for bad faith, Justice Beatty noted that a finding of an intentional failure to determine whether or not there was any lawful basis for refusal could in and of itself be used to prove that no lawful basis for the refusal ever existed.

> "The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the

conclusion that the legitimate or reasonable basis may be inferred and imputed to an inusrance company when there is a *reckless indifference to facts or to proofs submitted by the insured.*" Id. (Emphasis added).

It is respectfully submitted that the essence of this opinion with regard to the second tier of the test states very clearly that an insurer's reckless indifference to facts submitted to it creates a jury question as to whether or not the insurance company had, *at the time each successive denial was made*, a total lack of a legitimate or reasonable basis for denial. If the insurance company doesn't fairly evaluate a claim based on the information submitted, it is, in fact, the equivalent of no basis at all for the denial.

The case of *National Security Fire & Casualty Co. vs. Bowen*, 417 So.2d 179 (Ala. 1982), was the next in the line of cases defining the tort of bad faith. In this case, the Supreme Court again reiterated the elements of a bad faith action:

"(a) An insurance contract between the parties and a breach thereof by the defendant.

(b) An intentional refusal to pay the insured's claim.

(c) The absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason).

(d) The insurer's actual knowledge of the absence of any legitimate or arguable reason.

(e) If the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a ligitimate or arguable reason to refuse to pay the claim." Id. at 1983.

It is important to note that the court, in examining the evidence which was before the insurer at the time the alleged bad faith denial was made in *Bowen*, held that the reasons for denial must be considered in light of the information which was

available to the insurer *at the time the denial was made*. Id. at 183 (emphasis added).

Since *Bowen*, the Supreme Court has twice reiterated this most important factor in determining whether or not an insurer is guilty of bad faith:

> "Whether an insurance company is justified in denying a claim under a policy must be judged by what was before it *at the time the decision is made*." *National Savings Life Insurance Co. vs. Dutton*, 419 So.2d 1357, 1362 (1982); *Federated Guaranty Life Insurance Co. vs. Wilkins*, ____ So.2d ____, 17 ABR 2660 (Ala. 1983). (Emphasis added).

It is respectfully submitted that the reason for the obvious limitation of time and circumstances before the insurer in adjudging whether or not the insurer has been guilty of bad faith is so as to look at the actions of the insurer within the factual framework of the information which it had before it at the time each and every denial of a subject claim was made. In effect, bad faith, if it exists, is determined by those facts which exist and that information which is available at the time each successive denial is made.

Defendant in its brief relies very heavily upon the factual dispute which was placed in evidence by the various physicians which testified at the trial. Plaintiffs respectfully contend that the physician war which occurred at the trial of the case is merely a side show, put on by the defendant to try to obscure, for both the jury and the judge and for this court on appeal, those acts of fraud, conspiracy and intentional deceit perpetrated upon its insured during the course of its handling of the claim. Whether or not reasonable physicians would agree or disagree under the facts of this particular case is absolutely immaterial where the real issues revolve around whether or not Aetna intentionally and knowingly violated its own in-house procedures for properly handling claims—intentionally refusing to review the most important medical information which could be submitted on a given case—intentionally lying to its insureds—intentionally engaging in cover-up activities in an

attempt to whitewash its misconduct—intentionally committing perjury during the course of discovery connected with this case on the most critical issues involved in this case—and intentionally refusing to obtain even so much as the entire hospital chart on Mrs. Lavoie during the course of its four separate and distinct review of this claim prior to the litigation ensuing. As stated, with this type of misconduct it is a given, proven and literally admitted and uncontested matter at the trial of this case, that testimony of the physicians regarding whether or not the length of Mrs. Lavoie's hospitalization and the tests administered to her were reasonable and necessary means absolutely nothing.

Aetna concludes the first section of its argument by stating that the dispute over the reasonableness and necessity of the treatment rendered to Mrs. Lavoie thereby created a factual dispute over whether the contract benefits were due and owing to her and thus the plaintiffs were not entitled to a directed verdict at the close of all the evidence. The defendant goes on to cite the case of *National Savings Life Insurance Co. vs. Dutton, supra,* for the proposition that "if the evidence produced by either side creates a fact issue with regard to the claim the tort claim should not be submitted to the jury." (See defendant's brief at page 20). However, the defendant completely ignored the critical language in the *Dutton* opinion regarding the type of cases wherein the "directed verdict" rule would apply, and made no mention of Justice Jones' amplification in that regard in his special concurring opinion. The critical language, we submit, is:

> "In the *normal* case in order for a plaintiff to make out a prima facia case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the claim and, thus, entitled to recover on the contract claim as a matter of law. *Ordinarily, if the evidence produced* by either side *creates a fact issue* with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim

must fail and should not be submitted to the jury." Id. at 1362. (Emphasis added).

The first thing that the plaintiff would respectfully point out to the court is that none of this language in *Dutton* is meant to retract or modify that language noted in this same opinion to the effect that an insurance compnay's bad faith is adjudged *by what was before it at the time the decision was made.* (See *Dutton* at 1362). Thus, where the *Dutton* opinion later says "if the evidence produced by either side creates a fact issue with regard to the validity of the claim" we simply cannot view that evidence regarding the genuineness of the dispute over the validity of the claim in a void. On the contrary, this evidence must be viewed in the context of the time and circumstances which were before the particular individual or individuals by whom the claim was being reviewed to determine whether or not they had a valid, legitimate basis for denial *at the particular point in time that the denial was made.*

Justice Jones, in his concurring opinion which was overlooked by the defendant, stressed the phrases which we underlined in the quoted passage above. Justice Jones noted with regard to these phrases:

> "These are significant qualifications. Certainly, extreme cases will arise in which a fact issue will present a jury question on that claim."

It is respectfully submitted that the case of *Safeco vs. Sims*, ____ So.2d ____, 17 ABR 2298 (Ala. 1983), a case not cited by the defendant in its brief, further limits and modifies the "directed verdict" requirement of *Dutton*. In that case, the Supreme Court held:

> "We are of the opinion that the finding of a justiciable controversy is not the determining factor of whether there was or was not bad faith on the part of an insurance company to pay a claim. The standard for testing a bad faith claim is not found in either the adjudication of a

> justiciable controversy or the *judgment on the merits of the contact claim.* 17 ABR at 2305.

Again, Justice Jones, in his special concurring opinion, amplified upon the meaning of the quoted language in the majority opinion:

> "The standard for testing a bad faith claim is to be found neither in the adjudication of a justiciable controversy, standing alone, *nor in the judgment on the merits of the contract claim.* This is not to say, of course, that either of these holdings is irrelevant to the bad faith issue. To be sure, the filing of a declaratory judgment action, under appropriate circumstances, may evidence a good faith attempt to seek a prompt resolution of a disputed claim. *If, on the other hand, the refusal to pay is without legal excuse, the mere filing of a declaratory judgment action, followed by a finding of justiciable controversy, may enhance rather than diminish the degree of bad faith.*" Id. at 2307. (Emphasis added).

In commenting directly upon the *Dutton* case, Justice Jones stated:

> "This 'directed verdict on the contract claim' test is not be read as requiring, in every case and under all circumstances, that the tort claim be barred unless the trial court has literally granted plaintiff's motion for a directed verdict on the contract . . . Merely because the insurer may be able to withstand a directed verdict motion—the existence *vel non* of the record entry itself being an issue of fact—would not, as a matter of law, bar the plaintiff's tort claim." Id. at 2308-2309.

Justice Jones concluded with several examples of situations wherein a plaintiff would be entitled to recover under bad faith where he would not be entitled to a directed verdict on the contract claim.

By hypothesis, plaintiffs' counsel would respectfully submit the following situation for the court's review on the issue of

whether bad faith could exist, according to the standards set forth by the defendant in its brief.

By supposition, assume that a hospitalization claim for $20,000.00 was made to defendant insurance company, and that company paid only one-half of the total claim of $20,000.00. Assume further that the company had a contractual obligation to pay the full $20,000.00, and yet, through conspiratorial misconduct among ten of its employees in the medical department and the claims department, created a totally false and absolutely unsubstantiated reason for non-payment of the claim. Assume further that litigation was instituted on this claim for the $10,000.00 benefit which was yet to be paid. Assume that after discovery was taken from all of the ten involved employees from the insurance company, the case proceeded to trial. Assume further that, at the trial, nine of the ten employees of the defendant broke down on the stand, admitting they had lied in their deposition testimony, and agreeing with the plaintiff's contention that they had, indeed, engaged in a conspiracy to deprive the plaintiff of his contractual benefits. Assume, however, that the one remaining employee of the insurance company, perhaps a claim superintendent, insisted consistently throughout his testimony, both in deposition and at trial, that the insurance company had done no wrong.

Under the factual situation set forth hereinabove, and given the scintilla rule in the state of Alabama, there would be a factual dispute over whether or not the contract benefits themselves were owing to the plaintiff. Under these circumstnces, the plaintiff, under the view of *Dutton* expressed by the defendant in its brief, would not be entitled to a dircted verdict on the contract claim (simply because there *was* a factual dispute) and the trial judge *could not* grant a directed verdict in favor of the plaintiff even though the evidence was overwhelming that a gigantic conspiracy had existed. The plaintiff, not being entitled to a directed verdict, would thus not be entitled to go to the jury on the bad faith claim, and would be limited in his recovery to the amount of the contract claim itself.

Such simply cannot be the law. The law of bad faith had as its genesis the very idea of providing a plaintiff who had been victimized by the intentional, wrongful handling of his claim by his insurer the right to recover not only the contract damages he had sustained, but also for the compensatory loss of emotional suffering, humiliation, embarrassement and other compensatory losses, as well as punitive damages for the intentional, malicious, wrongdoing of the insurer. It is elementary that in literally every health insurance claim a defendant insurer will *always* defend its denial of the benefits to its insured based on the grounds that the prescribed treatment was not reasonable or necessary or both, and will put on the witness stand some physician who purports to be reasonable and who will disagree with literally anything that is at issue in the case. *Bad faith* is in the nature of a fraud. It was not created to redress an insured's disappointment over legitimate handling of his claims. It was designed to redress intentional, deceitful, conspiratorial misconduct on the part of an insurer. The law simply cannot impose upon the plaintiff a burden of first being able to eliminate all factual disputes over whether the contract benefits were due and owing to the plaintiff in those situations where actual, intentional, malicious, deceitful misconduct perpetrated upon its insured during the handling of the claim is proven by strong and convincing evidence to the satisfaction of both the jury and the trial judge.

II.
THE PARTIAL PAYMENT MADE BY AETNA CLEARLY IS INSUFFICIENT TO ERADICATE THE EVIDENCE OF BAD FAITH PRESENTED BY THE PLAINTIFFS.

The defendant argues to the court that the partial payment which it made of some of the charges incurred by Mrs. Lavoie during her stay in the Mobile Infirmary of some $1,300.00 of the total $3,000.00 bill serves as a complete defense to the claim of bad faith in this case in accordance with the principles of *Sexton vs. Liberty National Life Insurance Co.*, 405 So.2d 18 (Ala. 1981). The facts in the *Sexton* case indicated that a defendant insurance compnay had paid a substantial portion of the insur-

ed's bills, and this court held that the failure to pay the other part of the claim may very well have been a clerical error under the evidence introduced by the plaiontiff at the time of trial. In the *Sexton* case, however, as opposed to the instant case, there were no real facts which the plaintiff proved which made out a case of actual bad faith, conspiratorial misconduct or fraud on the part of the insurance company in the denial of the portion of the claim that the insurance company refused to pay. As such, the *Sexton* case is easily distinguishable from the Lavoie facts, in that, in this case, plaintiffs exhibited very clearly that literally each and every denial of the Lavoies' claims in the four separate denials of the claim was attended by fraud, recklessness, conspiracy, cheating and an absolute and total disregard for the rights of the insured to have their claim fairly evaluated.

Furthermore, along the lines of *Safeco vs. Sims, supra,* there is clear and convincing evidence in this case that the fraud and cover-up continued on into the legal proceedings themselves and, indeed, even to the point of having the admittedly perjured testimony of Mr. Hutton and others submitted to this Supreme Court on Summary Judgment in this case.

Logic dictates that an insurance company can certainly commit bad faith in the denial of a portion of a claim just as it can in the denial of the entire claim. The defense lawyers will argue that the express language in *Sexton* to the effect that any time any insurance company pays a "substantial portion" of a claim, there is automatically no case for bad faith. This is, we would respectfully submit, illogical and without merit, for what difference does it make if you have a $1,000,000.00 claim and the insurance company pays $200,000.00 or $400,000.00 or $600,000.00 of the claim and then, in admitted bad faith, without any legitimate basis for denial, refuses to pay the other portion of the claim? In the hypothetical situation set forth hereinabove, with admitted bad faith on the part of nine of ten adjustors handling the claim, would the insurance company be insulated from liability simply because it had paid a "substantial portion" of the claim even though they had literally robbed

the insured of the other portion of his rightful benefits? Surely such cannot be the law.

In addition, what is a "substantial portion" of a claim for purposes of the *Sexton* case? Does this mean greater than 50%? Or, in the case of a $1,000,000.00 claim, would $100,000.00 be substantial? If not, would $500,000.00 be substantial? In a $100 claim would $50.00 be a substantial portion? If so, should the insurance company be allowed to escape a judgment for punitive damages and bad faith if it literally robs the insured of the other $50.00? Or $500,000.00?

The defendant argues in conclusion that *Sexton* and *Bowen, supra,* stand for the proposition that partial payment is evidence of a lack of dishonest purpose in refusing to pay the remainder. If indeed this is the law, it cannot be questioned but that the plaintiff not only rebutted this evidence, but also clearly and convincingly obliterated the defendant's "evidence of a lack of a dishonest purpose" in this case by showing that the defendant's handling of their claim on all four occasions of its submission to Aetna was contaminated and infested with the fraudulent and deceitful and conspiratorial misconduct of Aetna.

III.
THE TRIAL COURT DID NOT ERR IN OVERRULING DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON THE ARGUMENT OF EXCESSIVENESS OF THE VERDICT.

The Supreme Court of Alabama recognized early on in the development of the tort of bad faith that public policy considerations dictated that an award of punitive damages would be justified where the defendant's actions in handling the claim of its insured were malicious, wilfull or committed with reckless disregard for the rights of its insured. In the case of *Gulf Atlantic Insurance Co. vs. Barnes, supra,* the court announced that the tortious nature of this action made punitive damages recoverable. The court carefully distinguished between the bad faith conduct which merely gives rise to compen-

satory damages as opposed to that conduct which would justify the imposition of punitive damages. The court noted the case of *Silberg vs. California Life Insurance Co*, 11 Cal.3rd 452, 113 Cal Reptr. 711, 521 P.2d 1103 (1974):

> "It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages. In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice. . . While we have concluded that defendant violated its duty of good faith and fair dealing this alone does not necessarily establish that defendant acted with the requisite intent to injure the plaintiff." 405 So.2d at 925.

The court noted further that Alabama allows recovery of punitive damages when the plaintiff has shown that he suffered at least nominal damage and that the acts complained of were committed with malice, wilfullness or wanton disregard for the rights of others.

> "Thus, for punitive damages to be awarded in Alabama, a defendant must not only intentionally have breached his duty of good faith, but in addition must have committed acts of the nature described above. Recoverable damages may include mental distress and economic loss." Id.

The tort of bad faith has been described as a "species of fraud". *Dumas vs. Southern Guaranty Insurance Co.*, 408 So.2d 86, 89 (Ala. 1981). As such, it is respectfully submitted that the entire body of law concerning fraud and punitive damages which has evolved in this state over the years would be applicable to the tort of bad faith where malice, wilfullness or wanton and reckless disregard for the rights of others has been shown.

The imposition of punitive damages is discretionary with regard to both the enormity of the wrong and the necessity of preventing similar wrongs. *Alabama Power Co. vs. Rembert*, 282 Ala. 5, 208 So.2d 205 (1968); *Treadwell Ford, Inc. vs. Leek*,

272 Ala. 544, 133 So.2d 24 (1961). An effective description of the purpose of punitive damages is found in *Ex parte Smith*, 412 So.2d 1222 (Ala. 1982):

> "It is to punish wrongdoers and to deter others from committing such wrongs that the law sanctions the award of punitive damages. It is a matter of policy of longstanding, the goal of which is the protection of the public from oppressive practices, particularly in the sale of consumer goods." 412 So.2d at 1225.

It is interesting to note that the defendant in its brief without expressly denominating its argument as such, seems to rely heavily on the ratio between the amount of the contract damages and the amount of the award returned by the jury. It has long been established in the state of Alabama that punitive damages need bear no relationship to the actual damages and that they may be greatly in excess of the actual damages. *Johnson Publishing Co. vs. Davis*, 271 Ala. 474, 124 So.2d 441 (1960); *U-Haul Company of Alabama vs. Long*, 382 So.2d 545 (Ala. 1980).

The relationship between insurer and insured is one which was recognized early on in the development of the law of bad faith as requiring special emphasis on the public policy goal of protection of the insured from oppressive practices of the insurer in the handling of first party claims. Indeed, the *Barnes* case noted that:

> "An insured purchases insurance and not an unjustified court battle when he enters into the insurance contract." *Barnes, supra*, 405 So.2d at 925.

However, merely giving lip service to the purpose of punitive damages in such cases (i.e. the punishment and deterence of oppressive, malicious and reckless misconduct) without allowing jury verdicts to stand in their entirety where the insurer has been shown to be guilty of the highest degree of misconduct in its handling of an insured's claim completely undermines the purpose of such damages. Such action merely gives notice to

the insurance industry at large that they need not fear facing a jury for their acts of maliciousness and conspiratorial misconduct, but rather can rest assured in the knowledge that they can always take an appeal and expect that the Supreme Court will remit the judgment by a substantial sum. It is elementary that, until this court decides a "bell cow" case which will set the standard for that degree of misconduct which the Supreme Court will not tolerate, the insurance industry as a whole will continue to appeal every single large verdict in this state with the assurance that they can either settle for substantially less while the case is pending on appeal or can expect the Supreme Court to drastically remit the verdict.

Again, we stress that the very purpose for the imposition of punitive damages is two-fold in its nature: (1) to punish the defendant for his oppressive acts in the particular case at hand *and* (2) to warn or deter others in similar businesses from such conduct in the future. *Badgett vs. McDonald*, 53 Ala. App. 726, 728, 304 So.2d 228 (1974). In such cases, the imposition of punitive damages is discretionary with a jury. *Ford Motor Credit Co. vs. Washington*, 420 So.2d 14 (1982).

This court set forth the guidelines for review of an alleged excessive verdict in the case of *Carlisle vs. Miller*, 275 Ala. 440, 155 So.2d 689 (1963):

> "It is almost platitudinous to restate the guiding rules, but here they are: the verdict of a jury should not be interfered with merely because in the opinion of the court the jury gave too little or too much . . . and the *authority vested in the courts to disturb a verdict of the jury on the ground of excessiveness is one which should be exercised with great caution*. . . Where, as here, there is no set standard for the admeasurement of damages but the damages to be awarded are left to the sound discretion of the jury, a remittitur or a new trial should not be ordered on the ground of excessiveness of the jury verdict except in those cases where the court can clearly see that the verdict has been reached on account of bias, passion,

> prejudice, corruption or other improper motive or cause . . . and only where the damages allowed are so excessive as to warrant the belief that the jury must have been misled by some mistaken view of the merits of the case should the court interfere and set the verdict aside. . . *Also, where the trial court refuses to grant a new trial because he does not believe the verdict is excessive the favorable presumption attending the verdict is thereby strengthened.*" 275 Ala. at 444. (Emphasis added).

It is respectfully submitted that the fact that His Honor, the Honorable Michael E. Zoghby, after closely monitoring the progress of the trial, and keeping much of the plaintiffs' evidence in check during the course of the trial, was nonetheless convinced that the award of the jury to the plaintiffs, given the gravity of the misconduct perpetrated upon the Lavoies by Aetna, was totally justified, and that the verdict should not be disturbed.

The Fifth Circuit has also noted that a reviewing court is not to be concerned with whether the verdict was "just too much" but rather with whether the verdict is the result of passion or prejudice. *Lowe vs. General Motors Corporation*, 624 F.2d 1373, 1383 (5th Cir. 1980). An excellent example of the Fifth Circuit's adherence to that rule can be found in the case of *Dorsey vs. Honda Motor Co. Ltd.*, 655 F.2d 650 (5th Cir. 1981). In that case, the Trial Court had set aside the jury's award of $5,000,000.00 in punitive damages on a Motion for JNOV. The Appellate Court reversed that ruling and reinstated the award and found that:

> "The punitive damage award is thus based directly upon the nature of Honda's conduct." 655 F.2d at 657.

The instant case is one which literally cries out for the imposition of a large punitive damage award. It is respectfully submitted that this court has not yet seen a set of facts wherein the conduct of an insurer has been as reprehensible as the conduct of Aetna was shown conclusively to have been in this case. There is absolutely no hint in the record of the jury being

biased, prejudiced or guided by any improper motive in this case. The trial judge himself was able to observe the demeanor of the witnesses, especially Mr. Hutton, during the examination of them on the witness stand. He likewise was able to observe the demeanor of the jurors during the course of the trial, and with all of this in mind at the time he ruled upon the defendant's motion for new trial, or in the alternative, for remittitur, the trial judge denied their motion, and left the entire verdict of $3.5 million standing. Such a verdict is necessary under the facts of the instant case to not only punish Aetna, but also to give fair warning to others in the insurance industry that such conduct simply will not be tolerated. It is again respectfully submitted that to remit the verdict under the facts and circumstances proven clearly and convincingly by the plaintiffs at the trial of this case will render punitive damages in the context of bad faith cases a toothless watchdog.

It is respectfully submitted that, in the posture in which this case now stands:

> "The only question regarding excessiveness is whether the judicial conscience is quickened by the verdict . . . If the strongest tendencies of the plaintiffs evidence were believed by the jury, such evidence clearly would support a finding of intentional, reprehensible conduct . . ." *Carroll Kenworth Truck Sales, Inc. vs. Leach*, 396 So.2d 1044 (Ala. 1981).

The defendant, in its brief, emptily notes that "the plaintiffs failed to adduce even a scintilla of evidence showing that punitive damages were proper in this case." Likewise, they seem to argue that because none of the defendant's claims examiners spit on the plaintiffs or were rude or nasty to the plaintiffs during the handling of the claims, the plaintiffs have failed in their burden of proving that the defendant acted with malice, fraud and intent to injure. To this we would respond in the words of Justice Jones, as we attempted to in the argument of this case, to the effect that:

> "Indeed a party may be exceedingly nice (even a perfect gentlemen) in his conduct toward the party defrauded and possess all of the malice and oppressiveness contemplated under our willfull deceit statute." *Mobile Dodge, Inc. vs. Patricia Waters*, 404 So.2d 26, 30 (1981).

The plaintiffs would respectfully submit that the judicial conscience of this Supreme Court should not all be quickened in a case wherein not only the strongest tendencies of the evidence, but also the literal admissions of the agents of the defendant, have established in whole or in part that the insurer:

> (a) made its initial denial of the subject claim without any legal justification whatsoever, having no medical opinion to support the denial when it was made;
>
> (b) made a second denial without any medical decision whatsoever being rendered, in violation of the established company procedure for handling such claims;
>
> (c) made a third denial of the claim without any medically qualified opinion to support the denial, again in violation of the company's established procedures;
>
> (d) intentionally misrepresented to the Lavoies that the claim had been repeatedly reviewed by members of the medical department, in an effort to run the Lavoies off, when in fact this was not true;
>
> (e) never had the "most important medical information" available on this file reviewed by any medical doctor with Aetna during the course of the four denials;
>
> (f) through its chief actor involved in the handling of the Lavoie claim, took the witness stand and literally admitted to having committed perjury in the case on the most critical aspects of the handling of the file;
>
> (g) tried to convince the jury that a "25" was a "28" so as to support its otherwise unsupportable denial of the Lavoies' claim;

(h) took the position that a woman who was bleeding bright red blood from the rectum, had flight of ideation, was acutely ill and demonstrated personality changes should have been treated as an outpatient. Without ever having reviewed the portion of the medical record which would have reflected this.

It is respectfully submitted that the strongest tendencies of the evidence presented by the plaintiffs in this case present the strongest facts in any case of bad faith which has yet been before this court. The stipulation of the parties which was before the jury during their deliberation was that the Aetna claims offices employed some 4,500 to 5,000 employees nationwide in 83 regional offices. (R. 566). Surely, this court's conscience should not be quickened by the amount of the verdict which was deliberately set by the jury in response to the Trial Court's proper charge to them to arrive at an amount which will punish the defendant, Aetna, for its wrongdoing, and to give a loud and clear deterent effect to others who would be similarly situated that such conduct would not be tolerated. It is a case of intentional and deliberate wrong, attended by circumstances of fraud, cover-up and conspiratorial misconduct. Certainly, this court's conscience cannot be quickened by the amount of the verdict where the acts of fraud and conspiracy were committed not only upon the Lavoies and their attorneys, but also upon the Supreme Court of the State of Alabama.

IV.
WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY AS TO WHY PLAINTIFFS DID NOT PAY THE HOSPITAL BILL IN QUESTION AND AS TO HOW MUCH THE PLAINTIFFS RECEIVED IN INCOME FOR THE MONTH OF FEBRUARY, 1977.

Before attempting to examine the substance of the Appellant's contentions, certain procedural matters need to be addressed. The issue on appeal centers on testimony given by the plaintiff, Mr. Roger Lavoie at R. 65-66. The objectionable

testimony must be broken down onto its own different sections due to the manner in which each objection was raised.

The first matter to be discussed is whether or not the defendant's objection to the first question of the objectionable testimony on which this issue of the appeal is based is properly reserved for appeal purposes. The question asked of the plaintiff, Mr. Lavoie, was as follows:

> "Q: Well, Mr. Lavoie, why didn't you just go ahead and pay the bill from the Infirmary and wait and see how the outcome of this would be?
>
> A: Because I didn't have the money.
>
> MR. CUNNINGHAM: Your Honor - - "

(R. 65).

It is apparent from the reading of the record that the witness had already answered the question prior to the Trial Court's receiving the objection from the defendant's attorney. This being the case, in order to properly preserve its right to appeal the ruling from the trial court the defense was required to not only object and state a specific ground for the same, but should have moved to exclude the plaintiff's response. There can be no error for the overruling of an objection that comes too late. *Star vs. Star*, 293 Ala. 204, 301 So.2d 78 (1974). If an objection is untimely then in order to preserve the record for appeal purposes a motion to exclude the objectionable portion of the testimony must be made. *Wilkinson vs. Duncan*, 294 Ala. 509, 319 So.2d 253 (1975); *Gilbreath vs. Gilbreath*, 278 Ala. 289, 177 So.2d 915 (1965). The Trial Court will not be put in error for admitting testimony unless an objection was made to the question when asked or unless the answer was not responsive and a motion was made to exclude the same. *Zekoff vs. Franklin*, 380 So.2d 869 (Ala. Civ. App. 1980). In that the defendant did make its objection timely it was under a duty to move to exclude the testimony given by the plaintiff. As a result, the court cannot be placed in error for overruling the objection.

The second area of this question centered around the plaintiffs' total family income for the month of February, 1977. Mr. Lavoie was asked about this and was allowed to give his testimony to the same. The actual reading of the court record is as follows:

> "Q: What was your total family income, you and your wife from Social Security and your disability and your wife's disability in February of 1977?
>
> MR. CUNNINGHAM: Your Honor, that's not relevant at all. As to what his income is has nothing to do with the material involved in this lawsuit.
>
> MR. CROWDER: Your Honor, it's very relevant.
>
> THE COURT: Overrule the objection."

(R. 65-66).

Mr Lavoie went on to testify that his total monthly income was $700.00 during this particular month.

The Appellant alleges in its brief that the only possible purpose of injecting such testimony was to reflect the plaintiffs' poor financial condition to elicit sympathy for the plaintiffs and to arouse passion, prejudice and hostility against the defendant. It is interesting to note that the defendant did not raise this as a grounds for the objection.

The plaintiffs offered proof that the bad faith refusal to pay the amount due for medical care to the Mobile Infirmary resulted in the plaintiffs receiving collection letters and threats of suit from the Mobile Infirmary, a collection agency and an attorney. All of this contributed to and/or caused the plaintiffs to suffer extreme emotional distress.

The law would require the plaintiffs to avoid or mitigate their damages if possible. It is certainly relevant and proper to offer evidence as to why the plaintiffs could not mitigate the damages by simply paying the bill. They couldn't because they

didn't have the money. They only made $700.00 per month to live on and therefore were not able to pay the bill.

The defendant argued that this was not relevant at trial. The test of relevancy is whether or not the evidence offered has any logical relationship between it and the ultimate inference for which it is offered. *McElroy's Alabama Evidence*, § 21.01 (3rd Ed.). Clearly, the evidence offered above meets the test of relevancy. Therefore, the Trial Court properly overruled the defendant's contention that it was not relevant. In any event, the defendant does not contend in its brief that the evidence presented was not relevant, only that it was prejudicial.

An exception to the admission of evidence that is otherwise relevant would be if the prejudicial effect outweighed its probative value. [See Justice Jones' concurring opinion in *Southern Life & Health Insurance Co. vs. Whitman*, 358 So.2d 1025 (Ala. 1978)]. The Evidence given was not prejudicial in that it did not establish the financial condition of the plaintiff. All that was shown by it was that the plaintiff could not pay the subject bill which was necessary to disprove any evidence of their failure to avoid or mitigate damages. In any event, however, the objection stated to the evidence admitted was centered on a relevancy argument. There is no evidence in the transcript, direct or by inference, either at the trial or in the defendant's Motion for New Trial, that the defendant voiced its objection in the premise that it was prejudicial. This matter was not raised until the Appellant stated its grounds in its brief. As such, it cannot raise the issue for the first time on appeal. *Callahan vs. Weiland*, 291 Ala. 183, 279 So.2d 451 (1973). There is nothing to appeal from in that the Trial Court did not have the opportunity to rule on the question of the prejudicial effect, if any, of the testimony offered. The only matter the Trial Court did rule on was the issue of relevancy, which was not raised as an issue on appeal. It is a generally accepted principle in this state that the Trial Court will not be put in error unless the matter complained about was called to the attention of the court by objection or other appropriate method. *Townson vs. Harvey Implement Company, Inc.*, 51 Ala. App. 238 (1973).

It is interesting to note that in its brief, the Appellant makes no reference to the relevancy of the testimony but attacks its prejudicial effect. Upon examination of the transcript, it is evident that the Appellant made no objection concerning prejudice, but rather its objection was centered on the premise that the testimony was not relevant. In that the Appellant has failed to properly preserve the record for appeal, the judgment is due to be affirmed.

The Appellant argues that the testimony given by the plaintiff, Roger Lavoie, was evidence of his poor financial condition. It is interesting to note that the defendant did not object to testimony given by both Mr. and Mrs. Lavoie to the effect that neither one of them was employed during this period of time. (R. 32, 56). Mr. Lavoie testified that he had retired from the Mobile Police Department and was on disability due to brain surgery. (R. 56, 32). Common sense would show that these two individuals were not wealthy people. This testimony would be indicative of their financial condition. As set forth above, it was not objected to. Therefore, the plaintiffs' financial condition was before the jury before any objection to testimony was ever elicited. An error in excluding evidence is harmless where it has been admitted at another time in another form. *Sweatman v. Federal Deposit Insurance Corporation*, 418 So.2d 893 (Ala. 1982).

Based on the foregoing, it appears that the Trial Court did not err in admitting this testimony. The testimony elicited by the plaintiff was relevant. The only question the Trial Court could have considered was whether or not the prejudicial effect of said evidence would outweigh the probative value of the same. This objection was never offered by the defendant and has not been mentioned until the defendant filed its brief. As such, the record for appeal has not been properly preserved and therefore the question cannot come before this Honorable Court. Therefore, the ruling of the Trial Court is due to be affirmed.

CONCLUSION

In conclusion, the plaintiffs would respectfully submit to the Court that the evidence before the jury and judge at the time their respective decisions were made in this case clearly and convincingly show a course of misconduct perpetrated upon the Lavoies by Aetna of the highest degree. Literally every critical witness who testified regarding the internal handling of the Lavoie claim was shown to have been guilty of direct lying to the Lavoies, intentional violation of company policies and procedures, and/or direct lying and/or cover-up regarding the critical matters involved in this case.

Aetna has been caught. Aetna has been given its day in court. The jury, properly impaneled and properly instructed in this case, served not only as the conscience of the community in reviewing Aetna's misconduct, but rather, in the face of evidence of some 4,500 claims adjustors employed by Aetna nationwide in some 83 regional offices, acted as the conscience of the entire nation to clearly and unequivocably announce to Aetna and others similarly situated in the insurance industry that such conduct in the future would not be tolerated and would be severely and thoroughly punished. His Honor, the Honorable Michael E. Zoghby, acted as the thirteenth juror in his role as the trial judge by properly overruling the defendant's motion for new trial and/or remittitur. Aetna now has come to this court, asking for relief from the judgment, while assigning literally no error in the Trial Court's handling of the case, the evidence which was submitted at the trial, the court's charge of the jury, or any other type of misconduct of court or jury during the course of the trial.

In an era wherein we have seen and experienced an avalanche of national advertising by insurance companies, constantly reassuring potential insureds with symbols such as "The Good Hands" and "The Umbrella" to protect one from his or her respective rainy day, and slogans such as "Aetna, I'm glad I metcha", our jurisprudence has already wisely recognized the need and desirability of a remedy in tort allowing for

the recovery of compensatory and punitive damages where an insurer deliberately and intentionally breaches the trust and confidence placed in it by its insured. It is respectfully and humbly submitted that the *Lavoie* case should be embraced by this court as setting forth that type of misconduct which must be shown by clear and convincing evidence in order to sustain an award of substantial punitive damages for bad faith. To overturn or remit the judgment in this case will completely undermine the law of punitive damages, and, instead of delivering a warning to insurers throughout this state regarding the consequences of bad faith, will instead render bad faith the "toothless watchdog" alluded to hereinabove, and will trigger an endless march of appeals through this court with insurers repeatedly comparing their degree of misconduct to that of the defendant, Aetna, in this case and asking the Supreme Court to let them off the hook.

The plaintiffs have prepared, and attach hereto as Exhibit 1, a summary of the four separate denials of the Lavoie claim by Aetna. This Exhibit, together with the transcript of the evidence and this brief should convince this court that the defendant's appeal is without merit, and that the judgment of the Trial Court should be allowed to stand in its entirety.

Respectfully submitted,

CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Attorneys for Appellees

BY:_____
JOSEPH M. BROWN, JR.

BY:_____
JOHN T. CROWDER, JR.

REQUEST FOR ORAL ARGUMENT

In accordance with Rule 34 of the Alabama Rules of Appellate Procedure, and although Oral Argument is not requested by the Appellant, Appellees would respectfully request Oral Argument of the issues and evidence of Bad Faith in this case together with the issue regarding punitive damages and excessiveness of the verdict due to the complex nature of the evidence herein.

CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Attorneys for Appellees

BY:_____
JOSEPH M. BROWN, JR.

IN THE SUPREME COURT OF ALABAMA

Case No. 82-426

AETNA LIFE & CASUALTY INSURANCE COMPANY,
Appellant,

-VS-

MARGARET W. LAVOIE AND ROGER J. LAVOIE,
Appellees.

Appeal From The Circuit Court
Of Mobile County, Alabama

APPELLEES' BRIEF IN RESPONSE TO APPELLANT'S PETITION FOR REHEARING

CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660
Attorneys for Appellees

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INTRODUCTION

In September of 1978, the plaintiffs, Margaret and Roger Lavoie, filed a complaint in the Circuit Court of Mobile County attempting to state a claim against Aetna Life & Casualty Company for wrongs which had been perpetrated upon them during the handling of an insurance claim by Aetna but for which there had never been any remedies recognized by the Supreme Court of this state. Nearly six and one half years and three appeals later, the majority of this Supreme Court has rendered an opinion which has boldly and honestly brought the law of bad faith out of a series of individual opinions and premises into a full circle of logical and well-defined legal principles which will provide instruction and guidance based squarely upon reason, logic and a genuine recognition of the difference between right and wrong to both bench and bar of this state for years to come. By so doing, this court has drawn the ire of the defendant, Aetna Life & Casualty Company, and its counsel in a manner unlike any that plaintiffs' counsel has ever observed. However, as opposed to having premised its argument upon some sound legal principle or factual basis which this court has overlooked, omitted, or otherwise failed to take into account in its opinion, Aetna has relied solely on bombastic rhetoric, false issues, and unmerited criticism of the majority's opinion in a last-ditch effort to avoid its just desserts in this case.

It is the purpose of this brief not to attempt to answer each and every argument set forth by defense counsel in its brief, for most of the arguments simply do not merit comment. This brief will, nonetheless, attempt to right the wrongs set forth by defense counsel in its brief, state some of the legal principles which have been glaringly omitted from defense counsel's brief, and offer once again in hopefully what will be the final chapter of this saga, a brief review of the evidence from which the jury concluded in this cause a that a judgement in the sum of $3,501,650.22 was both reasonable, necessary, and, indeed, mandated in order to rectify the wrongs perpetrated by the

defendant and its employees during the course of their handling of the medical claim of Margaret and Roger Lavoie.

THE STANDARD FOR REVIEW

Glaringly absent from defense counsel's forty-six pages of argument on this motion for reconsideration is even so much as the slightest glimmer of recognition that the standard for reviewing the correctness of the jury verdict by this Supreme Court demands that the court must review the record in a light most favorable to the appellee. *Cooper v. Peturis*, 384 So.2d 1087, 1088 (Ala. 1980). Defense counsel's refusal to recognize the standard for review as set forth in the above cited case has resulted in a brief on this motion for reconsideration which is nothing more than a rehash of the evidence which was presented to the jury in the trial of this case and, upon which, the jury concluded that Aetna had repeatedly committed acts of bad faith upon its insureds on all four of the reviews and denials conducted by Aetna during the claims handling procedure and which continued through discovery and even into the trial of the case itself. It is respectfully submitted by plaintiffs' counsel that a petition to this court on motion for reconsideration is not the proper forum for the advancing of arguments which have *never* been advanced at *any* previous stage of this litigation and which are literally heard for the first time ever on this motion for reconsideration, nor is it the proper forum for reconsideration of evidence which was properly within the province of the jury for consideration when the verdict was returned. It appears from a review of the defendant's brief that what Aetna would have this court do on reconsideration is to somehow take all of the evidence in the case, throw out the overwhelming weight of the evidence which supported the plaintiff's claim of bad faith against Aetna, and then substitute its own opinion for that of the jury and judge which heard the evidence, returned a verdict, and refused to grant a new trial or a remittitur as requested by the defendant. Certainly, the defendant's requests and pleas in its brief would violate all of the principles of

appellate review recognized in this state, and, as such, should summarily be denied.

The remainder of this brief will attempt to deal with some of the issues raised by defense counsel in very streamlined manner so as to succinctly exhibit to the court the weaknesses contained therein. We would humply submit that our brief in response to the defendant's brief on reconsideration truly pales by comparison with the majority's opinion already rendered in this cause, the opinion itself having answered in advanced and once and for all the charges futilely leveled against it by the defendant.

FORWARD

In Aetna's brief at page two they accuse the Supreme Court of "failure to mention, to meet, to analyze, and to answer certain contentions of the defendant." We would respectfully submit that the defendant's contentions constitute nothing more than fancy legal jargon without substance or merit. The original motion for new trial and appellate brief filed by Aetna in this cause raised only four issues, all of which were squarely and evenly dealt with in the majority's opinion. This motion for reconsideration is not a place for a retrial of the case and for jury arguments or doomsday rhetoric. The jury was entitled under the evidence to render a judgment in this cause, and did so. This Supreme Court has done nothing more than to review the evidence in the light most favorable to the plaintiffs in accordance with long-established appellate principles in this state and to enunciate once and for all in a clear and concise manner that actions such as were perpetrated upon the Lavoies by Aetna will simply not be tolerated in this civilized society.

ISSUE I
WHETHER AETNA LIFE INSURANCE COMPANY FAILED TO INVESTIGATE THE PLAINTIFFS' CLAIM.

In this section of defendant's brief, Aetna attempts to imply that the court has hinged all of the bad faith committed by Aetna in this case on Aetna's "failure to investigate" the claims

submitted variously by the Lavoies. (See pages four and eleven of defense counsel's brief). The plaintiff would respectfully submit that such is a completely facile analysis of the court's opinion and of the plaintiffs' burden of proof and the proof actually submitted at the trial of this case.

This court has cited time and again the case of *Chavers v. National Security Fire and Casualty Company*, 405 So.2d 1 (Ala. 1981) which enunciates the standard of proof in a bad faith action in the following manner:

> (A)n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either "(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal."

405 So.2d 7.

The above cited provision indicates very clearly that a plaintiff may recover in bad faith by showing that the insurer knew there was no lawful basis for refusal of payment of the insurance benefits owed or, in the alternative, that the insured intentionally failed to discover whether the refusal to pay was based upon some lawful basis.

The "intentional failure to discover" alternative basis of proving bad faith is discussed and examined further in *Gulf Atlantic Insurance Company v. Barnes*, 405 So.2d 916 (Ala. 1981):

> The second tier of the test is an elaboration on the first. The trier of fact, by finding, on the part of the insurer, an "intentional failure to determine whether or not there was any lawful basis for refusal," may use that fact as an element of proof that no lawful basis for refusal ever existed. *The relevant question before the trier of fact would be whether the results of the investigation were subjected to a cognitive evaluation and review.* Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred or imputed to an insurance company

> when there is a reckless indifference to facts or to proofs submitted by the insured. (Emphasis added).

405 So.2d at 924.

Further, this court has enunciated clearly and succinctly on several occassions that in determining whether or not bad faith exists in a particular case, the conduct of the insurer must be examined within the factual framework "*existing at the time of its actions.*" *National Security Fire & Casualty Company v. Bowen*, 417 So.2d 179 (Ala. 1982). (Emphasis added).

> Whether an insurance company is justified in denying a claim under a policy *must be judged by what was before it at the time the decision is made . . . National Savings Life Insurance Company v. Dutton*, 419 So.2d 1357, 1362 (Ala. 1982); *Federated Guaranty Life Insurance Company v. Wilkins*, 435 So.2d 10 (Ala. 1983).

It is indeed at once interesting and appalling to note that *nowhere* in the defendant's recitation of Issue I in its brief does counsel ever enunciate the principles set forth immediately hereinabove and upon which this Supreme Court has grounded all of its bad faith law since the very inception of the tort in this state. To the contrary, Aetna wishes to extract from the case certain minimal facts - *completely out of their factual context* - focus on an issue which has already been decided adversely to them based upon the overwhelmling weight of the evidence, and, by completely disregarding all appellate principles mandating a review of the evidence in the light most favorable to the appellee, hope that this court will by some miracle invade the province of the jury and reverse the verdict rendered against it.

It is critical to a proper examination of the brief submitted by Aetna on this reconsideration to note that at no time does Aetna ever acknowledge the instructive voice of this Supreme Court in the cases of *Barnes*, *Bowen*, *Dutton*, and *Wilkins*, supra, that the "existence *vel non* of bad faith must be measured not in a vacuum, but under the circumstances, and at the

time the insurer denied the claim." (Slip opinion page twenty-three).

The reason for Aetna's total disregard for the legal principles set forth hereinabove is indelibly etched not in the forty-six pages of their reconsideration brief, but rather in the six hundred pages of trial testimony taken in this cause; for if the evidence is rightfully viewed within the factual framework and proper chronology of events *as they occurred*, it is inescapable that acts of bad faith, fraud, collusion, and conspiratorial misconduct did in fact occur on the part of Aetna in this case.

It in indeed somewhat amazing that Aetna could have the courage under these circumstances to accuse the Supreme Court in its brief of an "anachronistic misconstruction" of certain of the evidence in this cause. (See page fifteen of Aetna's brief). We would indeed respectfully submit unto the court that the only way for Aetna to prevail in this case is to take the evidence in the case out of all chronological context as they have in their brief, and, further, to completely disregard all of the evidence indicating a conspiratorial mishandling of the *Lavoie* file and the later attempted cover-up of the same.

A brief review of the facts within their chronology indicates the following:

a. That Aetna made its initial denial of the subject claim *without any legal justification whatsoever* - the claims office having *no medical opinion* to support the denial as internally required by company procedures when it was made on AprIL 27, 1977 - the first medical review having taken place according to the handwritten notes of Dr. Swan, the handwritten memo of Mr. R. E. Mann, and the testimony of Mr. Hutton on *April 28, 1977*.

BAD FAITH OCCURRED HERE

b. That Aetna made a second denial through an admittedly unqualified claims examiner and without any medical decision whatsoever being rendered, in violation of the established company procedure for handling such claims;

there was absolutely no consultation with a physician on the "most important medical information" in the file.

BAD FAITH OCCURRED HERE

c. Aetna made a third denial of the claim again through its through its admittedly unqualified claims examiner and without any medically qualified opinion to support the denial, again in violation of the company's established procedures.

BAD FAITH OCCURRED HERE

d. Aetna intentionally misrepresented to the Lavoies that their claim had been repeatedly reviewed by members of the medical department in an effort to run the Lavoies off, when in fact this was not true.

BAD FAITH OCCURRED HERE

e. Aetna never had the "most important medical information" which was available on this file from the treating physician reviewed by any medical doctor at Aetna during the course of the four denials.

BAD FAITH OCCURRED HERE

f. Aetna, through its chief claims examiner involved in the handling of the Lavoie claim, Mr. Hutton, took the witness stand and literally admitted to having committed perjury in the case during his deposition and on issues constituting the most critical aspects of the handling of the file.

BAD FAITH OCCURRED HERE

g. In its fourth review and denial of the Lavoie claim, Aetna's senior claims examiner, R. E. Mann, who was conspicuously absent at trial, rendered his opinion on July 25, 1978 that the claim should be denied while *never once* mentioning any consultation whatsoever with Dr. Swan and, further, referencing only the newly submitted nurses' notes as the only additional information in the file

from the previous submission [no reports from Dr. Douglas in file at this time . . . (see carefully Mann's handwritten summary at TR. 86)].

BAD FAITH OCCURRED HERE

It should be carefully noted that in the denials referenced above as points "b" and "c", it is undisputed that *Aetna intentionally refused to pay the claim on both these occasions with absolute and unequivocable knowledge that they had not followed their own in-house procedures dictating the necessity for a review by a medical doctor of "complicated medical problems requiring a medical opinion" and especially with regard to the "most important medical information contained in the claims file."*

Plaintiffs would respectfully submit to the court that, while defense counsel and several other interested insurers in this cause on amicus would have this court reverse or substantially remit the bad faith portion of this award due to the fact that the Lavoies "came out alright in the end", it is inescapable that the Lavoies literally could have been run off at any interval in the above noted recitation of facts which actually occurred in this case, and that, if they had indeed been "run off" by the conspiratorial and fraudulant misconduct of Aetna, a total and complete miscarriage of justic would have occurred. Further, we would respectfully note that had this case been dismissed either on the pleadings, or on summary judgment based in whole or in part upon the admittedly perjured testimony of Mr. Hutton, there would have been a total miscarriage of justice. In this "all's well that ends well" approach to justice, would defense counsel and insurance *amicus* have the criminal cases against thieves nol prossed if they offered to return the stolen money after being captured?

With regard to the charge levied by Aetna at page seven of its brief to the effect that the majority incorrectly concluded that the physical therapy and back brace charges were not paid, plaintiffs' counsel would defy anyone on review of this

case to look at TR. 101, R. 51 and R. 175 referenced by defense counsel at page seven of its brief, and at TR. 101 and TR. 255 referenced at page thirty-nine of defense counsel's brief, and be able to discern whether these charges were or were not paid in this case. (Note carefully that the "brace" charge listed at TR. 101 was incurred on "3/24" and is thus not a part of the hospital charges in issue here). In any event, such argument is immaterial and irrelevant and, at best, grasping at straws, for the contract claim in issue was stipulated to be $1,650.22.

Time and again throughout Aetna's handling of the Lavoie claims, we find documentation in the Aetna file reflective of repeated denials qualified each time by the statement that the individual denial was "based upon the limited information available" or "based upon the information available". These qualifications placed upon the denials are particularly significant, especially in light of the fact that the evidence indicated that the denials were being made by Aetna's claims staff on each successive occasion without having the benefit of the most revealing sources of medical information available to Aetna. The evidence was replete with references to the significance of the nurses' notes, which were not obtained by Aetna until the last of the four denials was made. Likewise, the significance of the doctor's progress records - which indicated in this case that Mrs. Lavoie was suffering from diarrhea and bleeding rectally, and other significant medical and emotional problems - were, as pointed out in the majority opinion, *never obtained* by Aetna. The treating physician's reports, likewise acknowledged by Aetna's own medical doctor as being "the most important" medical information that could be obtained in a review of a file and upon which medical staff would reverse its opinion twenty-five percent of the time, were never reviewed by the medical staff. In light of these facts, there is implicit in the usage by Aetna of the terms "limited information" and "information available" a recognition that if Aetna kept as little information in their files as possible, they could continue to qualifiedly deny the Lavoies' claims indefinitely and could thereby manipulate this claim or any other claim, for that matter, into

"pigeonholed" posture until such time as the Lavoies or some other disgruntled claimant would finally give up and go away.

In conclusion, it is inescapable that, as stated in our introductory comments, Issue I is nothing more than an attempt by defense counsel to reargue and rehash the evidence in this cause, completely disregarding all chronology and appellate guidelines, and to have this court reverse the judgment or allow reconsideration for some improper reason. We would respectfully submit that Issue I contains nothing whatsoever which would merit a reconsideration of the opinion rendered in this cause.

ISSUE II
WHETHER DR. B. R. SWAN, ASSOCIATE MEDICAL DIRECTOR FOR AETNA CASUALTY & SURETY COMPANY RECEIVED AND REVIEWED THE LETTER REPORTS FROM THE LAVOIES' TREATING PHYSICIAN, DR. DOUGLAS.

At the very outset the plaintiffs would respectfully note for this court that nobody - including the entire Aetna claims staff that was involved in this case, Dr. Swan, or, for that matter, the defense lawyers - ever so much as even suggest anywhere in any of the briefs filed in this cause that Dr. Swan ever reviewed Dr. Douglas' second medical report dated December 15, 1977 and found in Aetna's Mobile office file at TR. 116.

It should further be noted that nowhere in the Aetna home office file found at TR. 81-100 are either of the two medical reports submitted by Dr. Douglas.

The court should further note the specific absence in Mr. R. E. Mann's 7/25/78 handwritten review of this file and in his July 28, 1978 inter-office communication of any reference whatsoever to either of Dr. Douglas' two reports generated in November and December of 1977, respectively. See TR. 82 and TR. 86. Please note also that while Mr. Hutton testified in his deposition that the reports of Dr. Douglas were in the home

office file, he admitted at trial that they were, in fact, nowhere to be found in the home office file. R. 484.

Please bear in mind that Mrs. Brenda Harris stated unequivocably that "the medical department has to base their decision on what the doctor informs them (in his doctor's report)" and that this was a hard and fast rule at Aetna with no exceptions. R. 155. In addition, Mr. Hutton testified that he did not consider himself as a senior claims adjustor to be qualified to render a medical opinion. R. 474. "That's why we have our medical department." R. 474. Dr. Swan was consulted on "complicated problems which require a medical opinion." See Swan at R. 187.

Dr. Swan himself testified that he considered "the most important bit of information" that the medical department could receive in cases such as the Lavoie case was a narrative report from the treating physician because it was "the most logical source of information". See Swan at R. 199. Dr. Swan further volunteered at R. 238 and 239 that he would, upon receiving such a report from a treating physician, change his opinion and rcommend coverage in fully twenty-five percent of all cases where such a report was reviewed.

Against this backdrop, an affidavit was produced by plaintiffs' counsel during the examination of Dr. Swan at his deposition. The signed copy of the affidavit itself was marked as plaintiffs' Exhibit 8 and is found at TR. 242-243. The court will recall the rather tentative testimony of Dr. Swan at R. 199 when he asked during the deposition the following as regards his second review of the Lavoie file on ± July 28, 1978 and particularly his review of Dr. Douglas' letter:

> Q: (By Mr. Sintz) Did you also consider Dr. Douglas' letter?
>
> A: Yes. I was thumbing through it to try—I was interested in reviewing the letter, whether that is responsive to your question.

Again, counsel for plaintiffs would respectfully submit to the court that Dr. Swan's answer was not responsive to the question, and reflects his furtive attempt to dodge Aetna's own counsel's questioning of him in that respect. On cross-examination by plaintiffs' counsel, Dr. Swan was asked about the affidavit which was filed in February of 1980 in support of the defendant's motion for summary judgment. R. 246. Initially, Dr. Swan denied signing it. R. 246. Then the lawyer for Aetna stated that he was not sure that the original was signed either. R. 246. Then Dr. Swan was not so sure that he even recalled ever seeing any such affidavit. R. 247. He could not see his signature on what was being tendered to him at that time. R. 247.

Then, after having the doctor sign a blank sheet of paper which was marked as plaintiffs' Exhibit 34 and found at TR. 297, the original of the affidavit was produced from defense counsel's own file and it bore the doctor's signature. R. 255. (See also plaintiffs' Exhibit 8 at TR. 242-243). Dr. Swan then noted that there didn't appear to be any reference to his "second review of the doctor's letter or anything." R. 256. This is amazingly and unbelievably consistent with the argument set forth at the bottom of defense counsel's brief at page fourteen where they contend once again that "the affidavit sets out solely the material that Dr. Swan reviewed during his first review of this file on April 25, 1977." However, even a cursory examination of the next to the last paragraph reveals that the affidavit states very clearly that the medical department of Aetna had reviewed the file on at least *two* occasions and that he, Dr. Swan, had reviewed the records twice as of the date he signed the affidavit. R. 260. This is obviously a reference to his April 28, 1977 review and the July 28, 1978 review, but defense counsel on reconsideration is still convinced that the two reviews unequivocably referenced in the affidavit relate only to the review of "April 25, 1977" (actually April 28, 1977). It is respectfully submitted that perhaps Aetna's total failure to comprehend intrinsic theories of numerical sequencing, Arabic

numerals, and general concepts of chronology could be the very problem that we have been experiencing in this cause.

In any event, Dr. Swan concluded his affidavit with the statement that, although he had reviewed the file on at least two occasions prior to signing the affidavit in February of 1980, he had not yet ever seen any "further information from Dr. Douglas to justify the admission" nor had Dr. Douglas supplied him with such information. (See carefully TR. 243 and R. 260).

To conclude his testimony, Dr. Swan denied having sworn to the affidavit at TR. 260, but then, after appropriate instructions from defense counsel, he suddenly experienced a restoration of his memory and finally confirmed the truth and correctness of this critical, next to the last paragraph of the affidavit. R. 260-261. In plain English, Dr. Swan swore in February of 1980, one and one-half years after his second review of the Lavoie claim, that he had reviewed the file on two occasions (April 28, 1977 and ± July 28, 1978) and had requested information from Dr. Douglas to substantiate the Lavoie claim, but he had simply never seen the two "most important" reports from Dr. Douglas which had been in Aetna's hands for over two years and which he had just sworn falsely in his deposition to having reviewed at the time of the July, 1978 denial.

Please note that all of the foregoing arguments and conclusions and inferences were set out by the plaintiffs in the appellants' brief filed after this case was dismissed by the trial court on summary judgment. This brief was filed with the Supreme Court of the state of Alabama on January 13, 1981 and was responded to by defense counsel. Almost two years later, this case went to trial in November of 1982 and, once again, the precise and identical information, arguments, and conclusions were presented to the jury and judge that tried this case. Both Dr. Swan in July of 1978, were conspicuously absent without explanation at the trial of this cause in November, 1982. Nowhere in any of the three briefs of Aetna filed either on summary judgment or on the appeal of this case do we ever find any

workable explanation or argument in response to the damning evidence elicited from Dr. Swan concerning his affidavit.

Now, for the first time ever, after a brief on summary judgment, an argument on summary judgment before this same court, an opening statement at trial, a three and one-half day trial, a closing statement at trial, two more appellate briefs, and an oral argument before the Supreme Court on this appeal, Aetna's counsel wants to bring up some document in their files in an attempt to explain away the glaring truth of the affidavit of Dr. Swan and his acceptance of that affidavit in his deposition testimony. Clearly, bad faith has occurred once again in the testimony of Dr. Swan and if there were some explanation for that bad faith, Dr. Swan had every opportunity to have explained it away during his deposition tstimony or could have been available to testify at trial after plaintiffs' counsel had clearly and indelibly etched out every inch of the argument to be made on this point in the brief filed on summary judgment in this cause. Clearly, the weak inference raised by defense counsel at this point in the case after all of the arguments and potential explanations that could have been offered is wholly inadequate and totally without merit. This motion for reconsideration is simply not a forum for a rehashing and reconsideration of evidence which was rightfully submitted to the jury and which was totally devastating to the defendant on this critical point. It is respectfully submitted that no further review on this subject is merited, there having been ample evidence from which the jury could conclude that at no time did Dr. Swan actually review Dr. Douglas' reports in any of the four reviews of the claim by Aetna.

ISSUE III

Plaintiffs' counsel does not wish to comment upon whether Aetna was guilty of "legal artifice" in this cause. Instead, plaintiffs would prefer to address this section of the brief to the argument that Dr. Donald Kirby, originally retained by the plaintiffs as an expert in this cause, substantiated in any re-

spect the claims made by Aetna that it was not guilty of bad faith in this cause.

Preliminarily, we would point out that nowhere in the testimony of Dr. Kirby do we ever find any question relating in any manner whatsoever to the fraud and conspiratorial misconduct of Aetna.

The reason for this is obvious. In several instances the defendant has, in its brief, referenced the fact that there was a point in time in this case before which none of the parties were aware of the "critical dates" contained in the Aetna file which revealed that the true issues in this case concerned the fraud, conspiracy, and bad faith perpetrated upon the Lavoies as opposed to any medical issue concerning the propriety of Mrs. Lavoie's treatment. Plaintiffs' counsel would agree with defense counsel in this respect and simply point out to the court that at the time Dr. Kirby was retained, we were of the opinion that the issue in this case would revolve around whether or not reasonable medical physicians could disagree over whether Mrs. Lavoie could have been treated as an outpatient and whether or not the certain (CAT, EKG and EEG) were reasonable and necessary under the circumstances.

An examination of the date of Dr. Kirby's deposition in comparison with the dates of the depositions of Dr. Swan and Mr. Hutton in Hartford, Connecticut tells the story. The record on the second appeal of this case indicates that Dr. Kirby's deposition was taken in Mobile on March 17, 1980. The depositions of Dr. Swan and Mr. Hutton were not taken in Hartford until August 8, 1980. It was not until August of 1980 at the depositions of Dr. Swan and Mr. Hutton that the real fraud issues in this case were discovered. At that point in time, the other issues concerning the propriety of medical treatment under the circumstances became secondary to the real issues of bad faith and conspiracy to defraud permeating Aetna's handling of the Lavoie claims.

Counsel for the plaintiffs would further take issue with Aetna's conclusions that Dr. Kirby agreed with Aetna con-

cerning the propriety of Mrs. Lavoie's treatment. A careful examination of the testimony cited by Aetna and relied upon apparently for the purpose of showing that Dr. Kirby agreed with Aetna in actuality exhibits a very tortured examination of him in an effort to get him to agree with Aetna's conclusions based upon certain hypotheticals. In the end, the only way Aetna's counsel could get Dr. Kirby to agree with him was by hypothecating a situation whereby Dr. Kirby was to assume only the the discharge diagnoses were as given in the discharge summary of Mrs. Lavoie's chart and, based solely upon those discharge diagnoses and nothing else, whether he would question the necessity of a twenty-three day hospitalization under the circumstances. Only then was defense counsel able to elicit a favorable response from Dr. Kirby, and now they argue that these questions, propounded in a void and without reference to the other critical documents in the hospital file, such as rectal bleeding, syncope, flight of ideation, etc., support their position that they were not guilty of any bad faith in this case.

First of all, as pointed out hereinabove, nothing in Dr. Kirby's entire testimony takes into account the actual fraud, bad faith, conspiracy, lying and cheating which was exposed on the part of Aetna during the trial of this case.

Secondly, it is axiomatic that if a questioner continually qualifies and requalifies and restricts and re-restricts his hypotheticals to a witness, thus narrowing the potential answers that could ever be given to the hyperqualified hypotheticals, eventually the witness will change his answer from a "no" to a "yes" based upon such questions. It is respectfully submitted that the weight and credibility to be afforded the answer given under such circumstances is indirectly proportional to the weight, by volume of paper, that it took the questioner to finally elicit the alleged favorable response from the witness.

Be that as it may, the entirety of Dr. Kirby's testimony and defense counsel's direct reliance upon it begs the question in this case because the facts which the jury had before them indicated that all four of Aetna's denials of the Lavoies claims

were bogus as of the time they were rendered and without any legal justification for them at all. As pointed out by the majority in its conclusions, a thousand experts testifying retrospectively on the propriety of Mrs. Lavoie's treatment could not ever change the fact that Aetna recklessly disregarded the facts and proofs of claims submitted by the Lavoies.

Counsel would also take issue with Aetna's tortured reliance upon the recently rendered opinion in the case of *Continental Assurance Co. v. Kountz*. [MS 82-793, Dec. 21, 1984,____ So.2d ____ (Ala. 1984)]. The critical language relied upon by Aetna in that opinion is found in the concurring opinion of Justice Jones to the effect that:

> If the fact finder rejects the factual basis for denial, and that basis is *supplied solely by the testimony of the insurer's agents or employees*, it would be ludicrous to allow such wrongful conduct to defeat, rather than enhance, a bad faith claim.

Aetna would torture the cited language to such an extent as to have this court believe that the simple presence in the case of Dr. Kirby, or of the fact that the City of Mobile Insurance Committee tooks a hands-off approach to this particular claim takes them outside of the "factual basis . . . supplied solely by the testimony of the insurer's agents or employees" language of *Kountz*, and thus gives them a loophole through which to dive and avoid the"*Lavoie* exception."

Such reasoning is, it seems, nothing more than another in a series of facile attempts on the part of Aetna to twist sound legal principles together with tortured facts in an attempt to avoid justice. Their reasoning totally overlooks the fact that Dr. Kirby was never consulted at any time during the four individual denials of the claim. It overlooks the fact that Dr. Kirby was not even consulted until quite some time after this litigation was filed. It overlooks the fact that three of the four fraudulent and conspiratorial denials of the Lavoies claims with their attendant misrepresentations had already been perpetrated upon the Lavoies at the time the City of Mobile Insurance

Committee was ever consulted. It further fails to recite any evidence wherein the City of Mobile Insurance Committee was presented with the true facts of Aetna's intentional mishandling of the Lavoie claim during the presentation of that claim to the committee.

For these reasons, and those previously set forth hereinabove, the plaintifs would respectfully submit that Aetna is not entitled to a rehearing on this appeal.

ISSUE IV
WHETHER THE EVIDENCE OF THE PLAINTIFFS' WEALTH OR POVERTY IS RELEVANT OR MATERIAL TO ANY ISSUE RAISED AT TRIAL.

As pointed out in our original brief in this cause, Aetna in its original brief makes no reference whatsoever to the relevancy of the testimony of Mr. Lavoie on this point, but rather attacked the prejudicial effect of the testimony upon the jury. As pointed out in the majority opinion, such evidence was certainly relevant to the issues attending the damages suffered by the Lavoies. Still further, as pointed out in our brief and even in the brief of the Alabama Defense Lawyers Association offered on *amicus*, it appears that defense counsel failed to properly preserve any error in this respect by timely and appropriate objections, and thus, the trial court cannot be placed in error for having allowed the evidence in at trial. The plaintiffs would respectfully submit that no error has occurred in the Supreme Court's opinion on this issue.

ISSUE V
THE ALLEGED EXCESSIVENESS OF THE VERDICT

This issue is treated amply and fairly in the majority's opinion in this case. The majority's reliance upon the trial judge's ability to observe the demeanor of each witness and the candor with which the witnesses testified at trial is particularly appropriate under the facts and circumstances of this case.

Nowhere in the forty-five pages of brief offered on reconsideration by Aetna do we ever find any reference to or expla-

nation for the perjured testimony offered by Tom Hutton, Aetna's chief actor in this case and an assistant supervisor of claims at the time this case went to trial. The *amicus* brief offered by the Alabama Defense Lawyers Association at page two wishes to water this testimony down, almost winking and smiling to this court as it denotes this critical testimony as nothing more than an "inconsistency" and implying that such testimony is not unusual at all. Plaintiffs' counsel and this Supreme Court certainly recognize that the converse is true and that one would not expect such blatant perjury on such critical facts and especially after the witness had reviewed his own file as often as Mr. Hutton had.

We make no apology for denominating Mr. Hutton's perjured testimony as "perjury", and we further take offense at *amicus* counsel's suggestion that we should be ashamed for having done so. Such argument on the part of *amicus* and Aetna overlooks the fact that the fraud committed by Mr. Hutton's perjured testimony extended not only to the Lavoies and their attorneys but also to the trial court (which granted a summary judgment and which could have been and was intended to be dispositive of this case) and even unto the Supreme Court of the State of Alabama which heard this case on summary judgment. Had it not been for the trial and its exposure of the fact that Mr. Hutton had indeed committed perjury a grave injustice may have otherwise been committed in this cause.

All of the foregoing is to prove that this case is far different from simple negligence or bad judgment on the part of Aetna's personnel as is implied by the brief of Aetna and of *amicus*. It is reflective of a continuing course of misconduct, repeated time after time prior to the institution of this litigation and continuing on through the discovery phases and trial of the case; and even now on reconsideration where defense and *amicus* counsel perform as legal contortionists seeking to twist and pervert sound legal principles to fit the ugly facts of this case.

Aetna likewise suggests in this section of its brief that the Supreme Court should follow some sort of "ratio rule" requir-

ing some relationship between the amount of compensatory damages actually suffered and the punitive damages awarded. Clearly, Alabama has never followed any sort of "ratio rule". In cases such as this, the magnitude of the case itself comes from the enormity of the wrong done rather than from the enormity of the monetary or physical harm suffered. So long as the means and intent to do harm as evidenced by the actions of Aetna are strongly and convincingly supported by the evidence, the enormity of their sin cannot be diminished at all by the contention that only a little monetary damage was suffered.

Likewise, punitive damages awarded in a case such as this cannot be viewed in a vacuum. Recognition must be given to the fact that an insured does not assume an equal bargaining posture with his insurer. Neither does the insured share the fiscal and legal resources immediately available to the isurer. It cannot be forgotten that the insured seeks the protection of his insurer in the hour of his greatest need. Likewise, insurers, including Aetna, have induced the reliance of the general public and their insureds through national advertising campaigns with their familiar emblems and slogans - the "goods hands people" - the "good neighbor policy" - the "umbrella covering all of your insurance needs" - "Aetna, we're glad we metcha".

It is the unique position of trust or fiduciary relationship solicited and assumed by the insurer from its insureds that mandates damages of a differing concept when this trust is breached under circumstances of deceit, fraud, conspiracy and cover-up.

Furthermore, as stated by Justice J ones in *Kountz*, supra:

> The very definition of bad faith failure to pay a valid insurance claim embraces the concept of an intentional injury: *the highest degree of culpability known to the law of torts.* (Emphasis added).

If it is the intentional tort that indeed constitutes the "highest degree of culpability known to the law of torts" what

degree of punishment and deterrence can truly be said to be excessive when that intentional tort is perpetrated by a fiduciary and is attended by fraud, misrepresentation and cover-up of the true facts extending even unto the highest judicial processes of this state.?

Surely, the majority's opinion in this case has adequately covered the topic of excessiveness, and no further discussion is merited here.

ISSUE VI
WHETHER THE DEFENDANT'S FACTUAL BASIS TO DENY A PORTION OF THE PLAINTIFFS' CLAIM WAS SUPPORTED SOLELY BY TESTIMONY OF THE DEFENDANT'S EMPLOYEES AND AGENTS.

Aetna frames this issue at page twenty-eight of its brief and the answer to the question positive must be a resounding "Yes". Again, Aetna has blatantly failed to adhere to the legal rquirements set forth in *Barnes*, *Bowen*, *Dutton*, and *Wilkins*, supra, that the "existence vel non of bad faith must be measured not in a vacuum, but under the circumstances, and at the time the insurer denied the claim." It is inescapable that, in *Lavoie*, the factual basis for denial at the tme each of the four denials was made by Aetna was supplied entirely by employees of the defendant. Aetna's attempt at "bootstrapping" itself into a more handsome position at this point in time must be viewed only as enhancing the bad faith already perpetrated by Aetna upon its insureds.

ISSUE VII
WHETHER THE MAJORITY'S OPINION WHICH REQUIRES THE TRIAL JUDGE TO MAKE DECISIONS CONCERNING THE WEIGHT AND CREDIBILITY OF THE EVIDENCE IN DECIDING WH ETHER TO GRANT OR DENY A DIRECTED VERDICT MOTION IS IN ACCORDANCE WITH ALABAMA LAW.

This question propounded by Aetna at page thirty-one of its brief is somewhat analogous to what plaintiffs' counsel would

respectfully refer to as the "end of the world" argument set forth in many of the briefs filed by *amicus*.

The concurring opinion of Justice Jones in *Kountz*, supra, clearly answers many of the questions raised by Aetna as well *as amicus:*

> *I think it is appropriate, here, to caution the reader that neither Lavoie* nor the instant case should be read as weakening the application of the directed verdict test in a bad faith claim context. It is a valid and useful threshhold gauge, testing whether the bad faith claimant has met the first prong of his *prima facie* burden—that is, whether he was entitled, as a matter of law, to recover on the contract claim. If not, there 'endeth' the tort claim of bad faith. If so, the claimant must meet the second *prima facie* prong: that the insurer acted in bad faith in failing to process or to pay the claim.

Contrary to the suggestions of *amicus* in its briefs, we do not submit nor does *Lavoie* as written require that an insurance company in all cases of medical claims submitted must have a medical doctor to review everything in the file. Nothing in the majority's opinion in *Lavoie* requires this, and a thorough reading of the facts as set forth in the majority's opinion reveals very clearly that the absence of the medical review in this particular case was critical because Aetna had established as a part of its own in-house claims handling procedure that such a medical review was proper and, indeed, mandated only in situations containing complicated medical problems which required a medical opinion for proper review. There is absolutely nothing of a legally horrifying nature in requiring that Aetna adhere to its own policies and procedures in the handling of its "complicated medical problems" and further that it refrain from deliberately and intentionally attempting to defraud its insureds during the course of its claims handling. To the contrary, the majority's opinion states only what any right thinking individual would require under the same circumstances.

ISSUE VIII
WHETHER THE SUBSTANTIAL PARTIAL PAYMENT BY AETNA LIFE INSURANCE COMPANY PRECLUDES A FINDING OF BAD FAITH OR, IN THE ALTERNATIVE, MANDATES A SUBSTANTIAL REMITTITUR.

This issue has been adequately dealt with in the majority's opinion. The stuation in *Lavoie* has been adequately distinguished from the situation set forth in *Sexton v. Liberty National Life Insurance Company,* 405 So.2d 18 (Ala. 1981) and improperly relied upon by the defendant herein. No further treatment of this issue is merited under the circumstances.

ISSUE IX
ALLEGED FACTUAL ERRORS

In this section, the defendant attempts to delineate several areas in the record wherein the majority has wrongfully and/or improperly quoted from the record.

The defendant's lead-off hitter in this section is its contention that certain testimony taken out of the presence of the jury was improperly relied upon by the majority in reaching its conclusion. That testimony is found in specie in the record at R. 99 and constitutes some of the testimony of Brenda Harris, Aetna's Mobile claims adjustor.

It is true that the jury was indeed out of the courtroom during the time that Mrs. Harris testified at this particular point in the record. (See R. 89). However, it is unmistakeable that Judge Zoghby certainly was in the courtroom during the time that this testimony was given and, as such, it could certainly be considered by him and by the Supreme Court in the role that it played in Judge Zoghby's ruling on the post-trial motions filed by the defendant. It will be recalled that this particular testimony of Mrs. Harris concerned her giving of the affidavit some thirty-five days after her deposition testimony which sought to reconcile her testimony concerning the "medical department" at Aetna and her failure to have a medical doctor review the medical reports of Dr. Douglas prior to

her representing to the Lavoies that the claim had in fact been reviewed by a member of the "medical department". Certainly, the defendant cannot contend that Judge Zoghby had no right to observe the demeanor and forthrightness of the witnesses at all points during their sworn testimony - even when the jury was out of the courtroom - and make his final decision regarding new trial or remittitur based upon the entirety of the evidence before him at trial.

However, the critical defect in this argument becomes clear upon an examination of R. 144 in the record. Therein, we find the precise, identical testimony that was elicited out of the presence of the jury at R. 99 given once again in the presence of the *judge and jury.* Accordingly, what the defendant would have this court to believe was improperly relied upon evidence was in any event given before the jury, and the defendant certainly cannot contend that it was harmed in any material respect.

The lead-off h itter has gone down swinging.

Part "B" of this section deals again with arguments which should have been made to the jury. Here the defendant plays fast and loose with the terms "attached material" and "material attached". Again, we have clever manipulation of words and chronology, but none of it is of any substance, and the inferences arising from any such arguments have already been resolved adversely to the defendant.

The rest of the defendant's arguments in this section constitute nothing more than another rehash of the evidence in this case. The critical question is whether or not there was evidence from which the jury could rightfully conclude that the statements made in the majority's opinion were factually correct and supported by the evidence. The answer to this is a resounding "Yes". Beyond this, the defendant merits no consideration whatsoever.

ISSUE X
WHETHER THE ERRORS COMMITTED HAVE RESULTED IN A VIOLATION OF AETNA'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES

First of all, Aetna's arguments concerning a confiscatory and excessive fine and that it has been denied equal protection under the laws of the United States were available to it when this case came up on appeal the first time. These arguments were not among any of the arguments advanced by Aetna in its motion for new trial nor on brief. The rules of appellate procedure do not afford a defendant an opportunity to advance arguments on rehearing for the first time. As such, its petitions in Issue X should be summarily denied.

Secondly, Aetna states in its last paragraph that the Supreme Court's decision in this case is "contrary to any notion of fairness." It is indeed appalling to think that this company, under the facts and circumstances of this case which mandated and required fairness at a very minimum in its dealings with its insured and yet which revealed fraud, conspiracy and repeated intentional wrongs perpetrated upon its insureds, should now petition this court out of "fairness" to "give us a second chance." This plea sounds in equity, and according to equitable principles long recognized in this state, should fall upon deaf ears.

CONCLUSION

It seems somewhat amazing that in a case wherein the overwhelming weight of the evidence clearly indicates a conspiratorial effort to defraud the plaintiffs out of their insurance benefits at a time of their greatest need and peril, the defendant now seeks with venom and anger to strike out at all of those who have exposed the appalling facts of their misdealings with the Lavoies and who have brought them to justice because of these actions. The irony of it all lies in the fact that Aetna, which, according to the great weight of the evidence in this case, lied, cheated and conspired its way through all of its dealings with the Lavoies, and which merits every word of criticism contained in the thirty-nine page majority opinion should now utilized the appellate processes of this state's judicial system to lash out at the Lavoies, their attorneys, the trial court, and, indeed, this Supreme Court in a final desperate attempt to overturn this case.

This Supreme Court has driven the final nail in the coffin of Aetna's misdealings in this cause, and reconsideration should not be the forum for venting their anger at being brought to justice.

Finally, the plaintiffs would respectfully submit to this court that the majority's opinion herein is nothing more or less than a rigorous examination of the facts of this case reviewed in accordance with long established appellate principles in this state. It is a opinion which will bring order to the house of bad faith—an opinion which firmly and indelibly etches in our jurisprudence the line of demarcation between right and wrong—an opinion to which the bench, bar and the general public of this state will point with reverence and pride for generations to come—an opinion containing a clear and definitive statement of what ought to be the law in this state.

If right is still right and wrong is still wrong, then justice has prevailed in *Lavoie*.

Respectfully submitted,

CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Attorneys for Appellees

BY: _____
JOSEPH M. BROWN, JR.

BY: _____
JOHN T. CROWDER, JR.

STATEMENT REGARDING AMICUS CURIEA [SIC] BRIEFS

Counsel has attempted in this brief to answer all arguments raised by Aetna in their motion for reconsideration and accompanying brief and has in addition attempted to answer many of the contentions raised by the various *amicus* briefs filed by other interested insurers herein. Unless specifically requested to respond to one or all of the *amicus* briefs filed, appellees would respectfully submit the foregoing brief without further response.

Respectfully submitted,

CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Attorneys for Appellees

BY: _____
JOSEPH M. BROWN, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 16th day of January, 1985, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed and first class postage prepaid.

BY: _____
JOSEPH M. BROWN, JR.

IN THE SUPREME COURT OF ALABAMA

Case No. 82-426

AETNA LIFE & CASUALTY INSURANCE COMPANY,
Appellant,

-VS-

MARGARET W. LAVOIE AND ROGER LAVOIE,
Appellees.

OBJECTION TO MOTION FOR DISQUALIFICATION AND MOTION FOR WITHDRAWAL OF OPINION AND FOR HEARING DE NOVO

Come now the Appellees, Margaret and Roger Lavoie, and object to the motion for disqualification and motion for withdrawal of opinion of December 7, 1984 and for hearing de novo filed by the Appellant, Aetna Life & Casualty Insurance Company, on February 21, 1985 and as grounds for said objection state as follows:

1. The Appellant has failed to meet the burden of proof placed upon it by the laws of the state of Alabama necessary for the disqualification of a single judge or for disqualification of this entire court as requested by the Appellant.

2. The Appellant has failed to show any judicial impropriety in the hearing of the instant cause and the opinion rendered on December 7, 1984 by either Justice T. Eric Embry or by the entire panel of judges sitting en banc in this case.

3. The disqualification of the entire court as moved for by the Appellant, Aetna Life & Casualty Insurance Company, would effectively deny the Appellees their right to have their case heard by the tribunal before which they would be entitled to have the case heard.

4. The failure of the Appellant, Aetna Life & Casualty Insurance Company, to raise the federal constitutional issues of excessive fine, lack of due process, and others, at any time in any of the other pre-trial, post-trial, or appellate proceedings in this matter, operates as an affirmative bar to their being raised for the first time on this motion.

5. The motion for recusal and for hearing de novo filed by the Appellant is untimely.

WHEREFORE, the Appellees respectfully pray that the court will enter an order overruling the motion for disqualification and motion for withdrawal of opinion and for hearing de novo filed by the Appellant in this cause and will further enter an order denying the application for rehearing filed by the Appellant and will enter a final order of judgment affirming the judgment of the Thirteenth Circuit of Alabama awarding $3,501,650.22 to the Appellees herein.

Respectfully Submitted,

CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Attorneys for Appellees

BY: _____
JOSEPH M. BROWN, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 1st day of March, 1985, served a copy of the foregoing pleading on counsel for all parties to this proceeding by hand delivery of the same.

BY: _____
JOSEPH M. BROWN, JR.

JA-140

IN THE SUPREME COURT OF ALABAMA

Case No. 82-426

AETNA LIFE & CASUALTY INSURANCE COMPANY,
Appellant,

-VS-

MARGARET W. LAVOIE AND ROGER LAVOIE,
Appellees.

BRIEF IN SUPPORT OF OBJECTION TO MOTION FOR DISQUALIFICATION AND MOTION FOR WITHDRAWAL OF OPINION AND FOR REHEARING DE NOVO

CUNNINGHAM, BOUNDS, YANCE, CROWDER AND BROWN
Post Office Box 66705
Mobile, Alabama 36660

Attorneys for Appellees

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ARGUMENT

I.

WHETHER JUSTICE EMBRY IS DISQUALIFIED FROM SITTING AND DECIDING THE ISSUES RELEVANT TO THIS CASE.

Any discussion of this particular subject matter must begin with the underlying assumption which has been repeatedly stated by the Appellate Courts of this state that "it is presumed that a judge is qualified and unbiased, and one alleging to the contrary has a substantial burden to show the grounds therefore." *Irby v. State*, 429 So.2d 1179 (Ala. Crim. App. 1983). See also *Ford v. Ford*, 412 So.2d 789 (Ala. Civ. App. 1982); *Wells v. Wells*, 346 So.2d 442 (Ala. Civ. App. 1977); *Street v. Hutto*, 46 Ala. App. 324, 241 So.2d 848 (1970).

Specifically, the defendant in this case alleges that Justice Embry has violated the Canons of Judicial Ethics by his participating in the discussions and eventual opinion in this case. The presumptions attending such allegations were specifically addressed in the case of *Reach v. Reach*, 378 So.2d 1115 (Ala. Civ. App. 1979), in the following manner:

> "Canon 3(C)(1) provides in part that a judge should recuse himself in a proceeding in which his impartiality might reasonably be questioned in instances where he has personal bias or prejudice concerning a party. Canon 3(C)(1)(a), *Canons of Judicial Ethics* (1976). Such prejudice is not presumed. *Wells v. Wells*, Ala. Civ. App. 346 So.2d 442, cert. denied, Ala., 346 So.2d 444 (1977); and it is incumbent on the moving party to prove that the bias is of a personal nature. *Pannell v. State*, Ala. Crim. App. 356 So.2d 219, cert. denied, 356 So.2d 222 (1977).
>
> Recusal is not required by mere accusation of bias unsupported by substantial fact. *Wallace v. Wallace*, Ala. Civ. App., 352 So.2d 1376 (1977)."

Id. at page 1117.

Furthermore, and also underlying this entire area of law in the state of Alabama, is that when allegations of this nature are leveled against a member of the judiciary, the allegations standing alone in no way imply the necessity for recusal itself. Simply stated, the party suggesting that such impropriety exists has a heavy burden of proof in showing this, and can simply not hope for recusal based on the mere fact that the allegation is made. See *Acromag-Viking v. Blalock*, 420 So.2d 60 (Ala. 1982); *Taylor v. Taylor*, 387 So.2d 849 (Ala. Civ. App. 1980); *Miller v. Miller*, 385 So.2d 54, cert. denied, *Ex parte Miller*, 385 So.2d 56 (Ala. Civ. App. 1980); *Marr v. Marr*, 383 So.2d 194 (Ala. Civ. App. 1980).

In the case of *Taylor v. Taylor*, 359 So.2d 395 (Ala. Civ. App. 1978), the court recognized the provisions of the Canons of Judicial Ethics calling for recusal of a judge in a situation where he cannot be impartial in hearing a case. Nonetheless, the court went on to further explain that:

> "However, we noted in *Wallace v. Wallace*, Ala. Civ. App., 352 So.2d 1376 (1977), that while Canon 3(C)(1) of the Alabama Canons of Judicial Ethics had the force of law, both judges and the bar should be aware that recusal was not required upon mere accusation of bias unsupported by substantial fact."

Id. at 398.

That is exactly the situation which is present in the case at bar. Defendant has made sweeping allegations of impropriety on the part of a justice of the Supreme Court of Alabama, but has substantiated this with absolutely no evidence whatsoever. Rather, by innuendo and suggestion, they make one last attempt at getting this judgment reversed by suggesting that this entire court is biased, prejudiced against them, and has not given them a fair hearing of all issues presented throughout the extensive course of the appeal of this case. But this court has stated in the past that "bias and prejudice must be shown by the conduct of the trial judge and may not be presumed or inferred by his subjective views." *Hartman v. Board of Trust-*

ees of the University of Alabama, 436 So.2d 837 (Ala. 1983). In fact, it has been definitively stated that:

> "It is settled that a court will be presumed to do its duty when called upon to decide a matter, and it will do so without bias, prejudice or preconceived notions about the case . . . [A] trial judge who is not disqualified or incompetent is duty bound to hear and decide issues and matters brought before him and that his disqualification, should it be raised, must appear from each case."

Ex parte Baggett, 48 Ala. App. 360, 264 So.2d 901 (1972)

The defendant in this case has a clear and unequivocable burden of proving by facts, and not inferences, that Justice Embry should have disqualified himself from participating in the decision and opinion in this case. They have not done so. Instead, they have merely shown that he has pursued and enjoyed the same rights as the rest of the citizens of the state of Alabama by seeking redress through the courts when he believes he has been wronged. This is certainly nothing which would lead one to the conclusion that he should not have fulfilled his sworn duty to participate in the opinion in this case.

II.
WHETHER ALL JUSTICES OF THE SUPREME COURT ARE DISQUALIFIED FROM SITTING AND RENDERING AN OPINION IN THIS CASE.

The defendant in this case has a two-prong attack on why this entire court should recuse itself from sitting and rendering an opinion on this case. The first prong is that because the other eight justices participated in discussions with Justice Embry, whom defendant alleges was not impartial and disinterested, that they themselves were tainted by his discussions and views. The second prong is simply that as potential members of the class of the Blue Cross/Blue Shield filed in the Jefferson County Circuit Court, that all members of this court have become something less than impartial and free from convictions in their approach to the decision in this case.

As to the first prong of this attack, the plaintiffs have previously addressed the question of whether or not Justice Embry should have participated in this opinion, and the natural result of that is that there was no resulting prejudice from any participation by him in conferences or discussions as to this particular case.

As to the second prong, plaintiffs would cite this court to the case of *Carden v. Hand*, 407 F.Supp. 451 (S.D. Ala. 1975). A similar issue was raised in that case, whereby the end result would have been an absolute disqualification of all possible tribunals before which the parties' action could be heard and decided. *Carden* held that in such a situation, if the end result would constitute a denial of a party's right to be heard, and to have justice thus thwarted, a disqualification of the entire court would not be appropriate.

That is exactly the situation which would result as a logical extension of the argument being presented by the defendant in this case. By claiming that the entire Alabama Supreme Court is prejudiced and tainted and unable to render a fair decision in this case, the defendant is in effect attempting to short-circuit the appellate process in its natural function. They suggest the alternative of the appointment of a special court by the governor of Alabama, but the question immediately comes to mind as to whether that would cleanse the harm alleged by the defendant. Since it is the status of all members of the Supreme Court as state employees which offends the defendant, is this same status not going to attach to other judges appointed by Governor Wallace to sit and hear this case? This is all the more reason to reject the second prong of this argument as presented by the defendant, and to leave the prior decision of this court standing as a full and correct review of the matter.

The plaintiffs would further submit to the court that the proposed impaneling of a special court as called for by Aetna would violate the mandate of the voters of the state of Alabama who elected this Supreme Court for the express purpose of hearing and adjudicating not only matters of established case

law but also cases involving questions of first impression. Nowhere in the state of Alabama will we be able to find another body of justices to hear this cause who have been given the approval of the voters of this state to hear cases such as *Lavoie*. Through their votes, Alabama citizens have looked at the various respective judges who sit today on this honorable body and, taking into account their respective pasts, their respective legal careers, their respective interests as lawyers, the respective legal positions which they have championed in their past, and their respective subjective views of the law—both existing and emerging—and have nonetheless given them their vote of confidence and approval to make the law in this state. Any challenge to any individual justice of this court or to the court as a body must certainly establish by clear and convincing proof any alleged impropriety on the part of one or all of the justices hearing this case before it should be allowed to succeed in disempaneling the Supreme Court chosen by the citizens of Alabama.

Of even more importance from a policy consideration standpoint is what the effect of the defendant's arguments carried to their logical extreme would have on the ability of this court to carry out its sworn function on a daily basis. It is not beyond the realm of realistic expectation to suggest that every single decision ever handed down by this court could in some tangential manner touch upon the lives of one or more of its members currently or at some point in the future. Nevertheless, that does not mean that this court is prohibited from carrying out its sworn function of hearing and deciding cases. The end result of the defendant's contention in this regard would strip this honorable court of its ability to sit and hear cases as it is called upon to do, and would in effect create a body which was judicially impotent. By way of illustrative examples, plaintiff offers the following as food for thought on the logical extreme of the defendant's contention in this case:

1. If a judge or close relative of a judge (District, Circuit, Court of Appeals or Supreme Court) has been the victim of a robbery, should that judge recuse himself on all rob-

bery cases that come before his court because his opinion would be tainted?

2. If a judge or close relative of a judge has suffered serious disfigurement, can that judge sit on a case where disfigurement is an issue?

3. If a judge or close relative of a judge has had a bad experience with an automobile dealer on the purchase of a used car that was represented as being new, does that mean that that judge should bring such fact to the attention of all parties prior to trial and can such judge ever sit on another automobile fraud case?

4. If a judge or close relative of a judge has been sued in an automobile accident, does that mean he can never sit as a judge in an automobile accident case?

5. If a judge or close relative of a judge has been the victim of rape, does that mean that that judge can never sit in another rape case?

6. Since judges are paid by the State of Alabama, does that mean they can never sit as impartial arbitors in a case where the State of Alabama is a party?

7. If a judge or close relative has been the victim of medical malpractice, does that mean that that judge can never sit on a medical malpractice case?

8. If a judge or close relative of a judge has been killed in a railroad crossing accident, does that mean that he can never sit on a railroad crossing case? A wrongful death action?

9. Because one of the lawsuits, the subject of this motion, purports to represent all employees of the State of Alabama, does this mean that no judge in the entire State of Alabama could sit and hear a bad faith case as long as the subject case is pending? Could he ever sit on another bad faith case in the future?

10. Should all bad faith decisions since January, 1984 be withdrawn and a new court empaneled to rehear them?

The list could obviously run on ad nauseum and equally absurdum. This is obviously something which is not intended, and can not be tolerated if this court is to serve a useful function. Therefore, it is axiomatic that the defendant's contention that this entire Supreme Court should be removed from consideration of this case should be summarily denied.

III.
WHETHER THIS COURT'S OPINION OF DECEMBER 7, 1984 SHOULD BE WITHDRAWN AND HEARD DE NOVO BY ANOTHER COURT.

Without unnecessarily reiterating everything that has been previously stated by the plaintiffs as to the propriety of this opinion and the manner in which it was heard by this court, this issue should simply be recognized for what it is: a desperate last attempt by the defendant to salvage whatever it can out of the predicament in which it has deliberately and consciously placed itself. The defendant is grasping at straws at this point in an attempt to avoid ever standing up and facing the punishment which has been meted out and repeatedly approved as appropriate. They can cite no Alabama case law whatsoever for the proposition which they suggest, and quite frankly, the plaintiff can see no analogies whatsoever in the authorities cited from neighboring jurisdictions. They simply have no application to the situation which is currently before this court, and therefore have no instructive value.

IV.
WHETHER THE RESULT RENDERED IN THIS CASE WILL DEPRIVE DEFENDANT OF PROPERTY IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This honorable court is well aware of the long history involved in this case. There were appeals involved before an actual trial on the merits, a full and fair trial was conducted

with the resulting jury verdict supported by overwhelming evidence of misconduct on the part of Aetna, and an exhaustive review through the appellate process has been completed. However, now, for the first time ever, defendant sees fit to raise constitutional due process arguments before this court. The plaintiffs feel compelled to categorize these arguments as exactly what they are. Defendant realizes that it is literally at the end of its jurisprudential rope. They also realize that their only hope of ever getting the verdict overturned is to get out of the state appeals process and hopefully breathe new life into their defense by attempting to leap into the federal court system for a last-ditch salvage operation. In an attempt to do so, they now raise due process arguments for the very first time.

Besides recognizing this as a flagrant affront to the intelligence of this court, it is also an issue which is raised too late and has been waived. As the plaintiffs cited on page 66 of their original brief, issues may not be raised for the first time on appeal, much less after the entire appeals process has been completed and resolved unfavorably against a defendant. See *Callahan v. Weiland*, 291 Ala. 183, 279 So.2d 451 (1973).

In short, the plaintiffs strongly suggest that any constitutional or due process argument should be rejected out of hand as both an attempted sham to further extend the appeals process as well as having been waived by not being raised prior to this point in the appeal. There comes a time when any party's rights to receive the full benefit of all appeals have been exhausted, and the defendant has reached that point.

V.
HAS THE DEFENDANT'S MOTION FOR RECUSAL BEEN TIMELY FILED?

It is a well recognized principle of law that a motion for a judge to recuse him or herself should be filed prior to a determination on the merits. The reason for that is obvious, and was cited in the case of *Roussel v. Tidelands Capital Corporation*, 438 F.Supp. 684 (N.D. Ala. 1977). That is, that without having the element of control inherent in having a motion to recuse

decided before a decision is reached, there is the potential abuse of a party simply withholding information, hoping for a favorable result. If that result is not forthcoming, then the option is always open to raise a belated motion for recusal, thereby hoping to obtain the best of both worlds. Therefore, there is a heavy burden placed on one filing a motion for recusal after a determination has been reached to show good cause for the untimely filing of such.

The cases setting forth the requirements for such a motion have been clear, and very specific. Particularly, they have repeatedly stated that the affidavit in support of a motion for recusal must be signed by a *party* to the litigation, setting forth the facts for the belated filing and the affirmative statement that no knowledge was possessed prior to the date of the filing *by the party* which would have allowed them to file in a timely manner. This has not been done in this case. Instead, an affidavit by the defendant's *attorney* has been filed, in which it is stated that no one *representing* the defendant had any knowledge of this prior to February 14, 1985. The cases interpreting such affidavits have specifically held that an affidavit by an attorney will not suffice and that it must come from a party to the litigation itself. *U.S. v. State of Alabama*, 571 F.Supp. 958; supplemented at 574 F.Supp. 762 (N.D. Ala. 1983).

Upon reviewing the affidavit from defendant's attorney, nowhere in this document is it stated that Aetna Life Insurance Company itself did not have prior knowledge of the facts contained within this affidavit until February 14, 1985. It is merely stated that no one representing them did, and that is a different question. That is one of the underlying bases behind the strict requirements for such affidavits in support of a motion for recusal, particularly when one is filed after a final determination has been made on the issue at hand. Furthermore, how can the attorney for Aetna in this case represent to the court that attorneys representing Aetna elsewhere—in Birmingham or Hartford—had no knowledge of the class action suit filed in Birmingham?

It has even been held that the term "party" as used within that definition does not include the counsel representing one of the litigants in a cause of action. *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, reh. denied 521 F.2d 814, cert. denied 425 U.S. 944, 96 S. Ct. 1685, 48 L.Ed.2d 188 (5th Cir. 1975).

There is intrinsic in the cases interpreting this type of motion a certain caution or suspicion when such motion is filed after the conclusion of all consideration on the merits of the case. Therefore, the cases have repeatedly held that the movant on such a motion will be held to a strict burden of proof to show good cause for the filing of the motion at that time. Using that standard, the plaintiffs respectfully submit that the defendant's motion is untimely, and that the necessary elements which must be shown to excuse such untimeliness have not been met.

CONCLUSION

In conclusion, the plaintiffs would respectfully submit unto the court that Aetna has fallen miserably short of discharging its heavy burden of proving, by legally sufficient and convincing evidence that there has been any impropriety or violation of the Canons of Judicial Ethics on the part of any member of this honorable court. Further, Aetna has fallen miserably short by failing to timely raise the objections made in its motions. No legally sufficient excuses have been offered by Aetna for the failure to file its motions in a timely manner. Thus the motions as filed should be overruled.

Once again, as we have seen throughout nearly seven years of litigation in this cause, Aetna has failed to honestly present itself to this court by fairly and forthrightly presenting hard, concrete evidence to support its allegations of judicial impropriety. Instead, they have elected to slander this honorable court with bombastic allegations of judicial impropriety without even so much as offering legally sufficient evidence to support their empty allegations. The cases dealing with the

legal sufficiency of affidavits in support of such a challenge are extremely instructive. These cases establish as an absolute requirement the necessity for filing affidavits of parties for the express purpose of disallowing a party to challenge a judgment after the judgment has been entered via recusal motion when the party may very well have known all along that it had a basis for filing its motion for recusal. Under such circumstances, the slander which has been cast upon this Supreme Court by the motions filed by Aetna is utterly intolerable and unforgiveable.

Although it is not a part of this case, the Lavoies would also wish to briefly address a point raised by the motion of *Nationwide* in the companion motions filed by that insurance carrier almost simultaneously with the motions filed by Aetna. Nationwide attempts to make much out of the line of cases between *Barnes* and *Lavoie* which found in favor of the insurance carrier on the issue of bad faith. The plaintiffs would respectfully submit to the court that the development of the tort of bad faith has been nothing more or less than an honest attempt by honest human beings who, despite their own respective backgrounds, legal experiences, former clients, and subjective views of what the laws should be, have forged out a definition of exactly what this new tort should consist of. We must respectfully submit that when objectively viewed in the light of the wrongs which the tort of bad faith seeks to right and the factual context out of which the tort has arisen, this tort has been given a fair, well-founded and well-defined basis by this court which will provide guidance to plaintiffs, insurance carriers, bench and bar for years to come.

Finally, it is at once distressing and practically unbelievable that an insurance carrier, who was shown by clear and convincing evidence to have been guilty of literal lying, cheating, deception, and admitted perjury throughout the handling of the Lavoies claim, the pre-trial aspects of this case, and up to and including the trial itself, can now come to this Supreme Court with an empty motion for recusal and disqualification of an honorable justice of this court and indeed this entire honorable court. Aetna stands before this court dirtied by the revela-

tions of the evidence which proved that they acted through their employees with a malignant heart in all of their dealings with their insureds and continued the perpetration of their fraud even unto the trial court and to the Supreme Court of the state of Alabama. They stand now before the court and point a bloody finger not just at the Honorable Justice Embry, but at the entirety of the court with the allegation that "someone must have cheated us." But beyond this bare allegation, Aetna has brought nothing with it to the court in proof of its allegations. It is at the end of its jurisprudential rope. There is no substance in its allegations, and its briefcases are empty. It is time that Aetna met its just desserts.This case involves a 5-4 decision. This decision, it is respectfully submitted, has been made by honest human beings doing their level best to achieve justice according to their own views of what the laws should be as applied to the horrible facts of this case.

The motion for recusal and for disqualification of a justice of this court and of the entirety of the court itself is altogether a different matter. It is slanderous and is a blight on the legal community of this state and should not be tolerated. Whether the decision in *Lavoie* stands the test of reconsideration or not, we would respectfully submit that this court should unite as one in issuing to Aetna a firm and unanimous answer that there has been no judicial impropriety whatsoever in meting out the judgment which has rightfully exposed and punished Aetna for its wrongdoings in this cause.

Respectfully submitted,

CUNNINGHAM, BOUNDS, YANCE,
CROWDER AND BROWN
Attorneys for Appellees

BY: _____
JOSEPH M. BROWN, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 1st day of March, 1985, served a copy of the foregoing brief on counsel for all parties to this proceeding by hand delivery of the same.

BY: _____

JOSEPH M. BROWN, JR.

Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,

Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,

Appellees.

On Appeal From The Supreme Court Of Alabama

BRIEF OF APPELLANT

Of Counsel:

PETER V. SINTZ
WM. M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Conn. Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on one class of unsuccessful defendant-appellants, but which imposes no corresponding burden on other defendant-appellants or on unsuccessful plaintiff-appellants, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether appellant's right to a fair, unbiased hearing of its appeal below, guaranteed by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, was denied because of the participation in the consideration and decision of this case, an action seeking punitive damages for alleged bad faith failure to pay an insurance claim, by a Justice of the Supreme Court of Alabama who, while this case was *sub judice* in the Supreme Court of Alabama and without notice to the parties to this case, filed and continued to prosecute a civil class action against an insurer seeking punitive damages for alleged bad faith failure to pay insurance claims, where several issues raised in and central to that class action would have been predictably controlled or substantially affected by rulings of law rendered by the Supreme Court of Alabama in its judgment and opinion issued in this case.

3. Whether the subjection of appellant to liability for punitive damages for bad faith failure to pay an insurance claim with respect to a contract executed in 1967 and performed in 1977 and 1978 violates the Contract Clause, Art. I, § 10, cl. 1 of the Constitution of the United States, because it imposes retrospectively a new, unanticipated and severe obligation on that contract in the form of a cause of action for bad faith failure to pay an insurance claim, accompanied by exposure to virtually unlimited punitive damages, which obligation was not recognized by the State of Alabama until 1981.

4. Whether the award of $3,500,000 in punitive damages against appellant for failure to pay a $1,650.22 insurance claim

is violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, because it is vastly out of proportion to actual damages, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States because it was imposed pursuant to a non-statutory cause of action under which no limitations are placed on such punitive damage awards, because the payment of this award to appellees is a windfall and advances no legitimate state purpose, and because it was imposed as a punishment without adequate notice to appellant of the substantive rules governing such conduct.*

All parties to this case are named in the caption. The parent and subsidiaries of Aetna Life Insurance Company are as listed in the Jurisdictional Statement in this case, at p. ii. On April 10, 1985 the court below granted appellant's second motion to correct the caption in the case to show Aetna Life Insurance Co. as the appellant-defendant in this case vice Aetna Life & Casualty Co.

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BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of December 7, 1984 is reproduced in Appendix A of the Appendix to the Jurisdictional Statement (J.S. App. 1a-63a) and is unofficially reported in 19 Ala. Bar. Rep. 272. The March 8 and March 25, 1985 orders and opinions of the court below are reproduced in J.S. App. 64a-73a and J.S. App. 74a-75a, respectively. The Circuit Court of Mobile County issued no opinion. The prior opinions of the court below in this case are reported *sub nom. Lavoie* v. *Aetna Life and Casualty Co.*, 374 So.2d 310 (Ala. 1979), and 405 So.2d 17 (Ala. 1981). On June 3, 1985 this Court ordered argument of this case, with further consideration of the question of jurisdiction postponed to the hearing on the merits.

JURISDICTION

The appellate jurisdiction of this Court under 28 U.S.C. § 1257(2) is invoked because the December 7, 1984 decision and March 8, 1985 order overruling appellant's Application for Rehearing necessarily upheld the constitutionality of § 12-22-72, *Code of Alabama* (1975), against appellant's federal constitutional challenge to that statute, presented to this Court as Question 1. Questions 2, 3 and 4 were duly presented to the court below and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487 n.14 (1975). This appeal was docketed on April 9, 1985, within the ninety-day period for docketing appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and §§ 12-22-72 and 27-1-17, *Code of Alabama* (1975), are as set forth in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT OF THE CASE

Appellant, Aetna Life Insurance Company, has been found to have breached a contractual obligation to pay $1,650.22 in benefits under a group health insurance policy. Based upon a theory of tortious liability for bad faith refusal to pay insurance benefits, which did not exist in Alabama when (and where) the contract was executed and performed, $3,500,000 has been added to that contractual liability as punitive damages. Another $350,165 has been awarded to appellees pursuant to an Alabama statute which imposes an automatic ten percent penalty upon litigants who unsuccessfully appeal money judgments. Appellant must also pay interest on the total sum and costs on appeal. The opinion of the Supreme Court of Alabama which affirmed and imposed these awards by a five-to-four vote was authored by a Justice who, without disclosure to the litigants, had filed two "bad faith" cases against insurance companies, one of which was filed on behalf of a class of Alabama public employees, including his colleagues on that court, and which was pending during most of the time his court had this case *sub judice*.

On February 1, 1967 a contract went into effect between appellant and the City of Mobile which provided for a group policy of insurance to cover employees of the City of Mobile and their dependents (J.A. 34-48). At that time and for more than fourteen years thereafter, neither the statutory nor common law of Alabama recognized an action in tort for punitive or any other form of damages for "bad faith" failure to pay insurance claims.

On February 3, 1977 appellee Margaret W. Lavoie, the dependent of an insured under the contract between appellant and the City of Mobile, was admitted to the Mobile Infirmary Hospital, from which she was discharged twenty-three days later with a discharge diagnosis of "osteoarthritis, mild psychophysiologic reaction manifested by abdominal pain." On June 3, 1977 appellant made payments of $1,579.74 under its policy,

but declined to pay the balance of the claim, $1,650.22. (J.S. App. 2a-3a, 4a, 6a).

Appellant's declination to pay the remaining portion of the claim was based on its position (later rejected by the trial court) that certain tests were "not usual and customary procedures for the diagnosis given" and that the tests for which appellant had made payment could have been administered on an outpatient basis. (J.S. App. 6a). Thus, appellant's refusal was based on its assessment of its contractual obligations under which it had no duty to pay for "care, treatment, services or supplies which are not necessary for the treatment of the . . . disease concerned." (J.S. App. 11a; J.A. 40). Appellant subsequently reiterated its decision not to pay the $1,650.22 claim. (J.S. App. 8a-10a).

On September 29, 1978 appellees filed a civil action against appellant seeking $1,650.22 in contract damages and punitive damages. (J.A. 3). Since Alabama had not previously recognized the possibility of recovery in tort for the "bad faith" failure to pay an insurance claim, the trial court, on November 17, 1978, dismissed with prejudice appellees' four causes of action seeking punitive damages for failure to state a claim for which relief could be granted. (J.A. 3). On August 31, 1979 the Supreme Court of Alabama reversed the trial court and remanded the case, stating that it had "not foreclosed the possibility" of recovery under a "bad faith" theory. *Lavoie* v. *Aetna Life and Casualty Co.*, 374 So.2d 310, 312 (Ala. 1979).

After a period of discovery, on October 10, 1980 the trial court granted appellant's motion for summary judgment on the four causes of action for punitive damages. (J.A. 3). On October 2, 1981 the court below once again reversed the trial court and remanded the case "in . . . light of" its "recent [the same day] decision . . . recogniz[ing] the intentional tort of bad faith in first party insurance actions." *Lavoie* v. *Aetna Life and Casualty Co.*, 405 So.2d 17, 18 (Ala. 1981). That same day, the court below for the first time determined that punitive damages would be recoverable in this newly recognized tort.

Gulf Atlantic Life Insurance Co. v. *Barnes*, 405 So.2d 916, 925 (Ala. 1981). Also on October 2, 1981 the court below determined that partial payment of a claim, as occurred in the case at bar, would generally preclude liability for bad faith refusal to pay an insurance claim. *Sexton* v. *Liberty National Life Insurance Co.*, 405 So.2d 18, 22 (Ala. 1981).

This case subsequently went to trial on November 1, 1982 based on a fourth amended complaint. (J.A. 4). In the interim, the Supreme Court of Alabama had issued a decision holding that, as a general rule, a bad faith action would not be recognized unless the plaintiff were "entitled to recover on the contract claim *as a matter of law*," *National Savings Life Insurance Co.* v. *Dutton*, 419 So.2d 1357, 1362 (Ala. 1982) (emphasis added), and had reaffirmed the rule it had established in *Sexton* regarding partial payment. *National Security Fire & Casualty Co.* v. *Bowen*, 417 So.2d 179, 186 (Ala. 1982).

On November 4, 1982 the jury returned a verdict for the appellees in the sum of $3,501,650.22 (J.A. 4), $3,500,000 of which was assessed by the jury as punitive damages and $1,650.22 of which was awarded on the contract claim.

On September 8, 1983 appellant filed its opening brief in the court below. On November 17, 1983 the "Maddox Division" of the court below denied oral argument and the case was submitted to that Division. (J.A. 1).

On November 23, 1983 Justice Embry of the court below gave notice to the Maryland Casualty Company ("Maryland Casualty") of the loss of a valuable mink coat. On January 19 1984 Justice Embry filed a bad faith action against Maryland Casualty in the Circuit Court for Jefferson County, Alabama, alleging that Maryland Casualty "in bad faith, willfully, intentionally, and/or maliciously failed to pay a valid claim" and praying for "punitive damages." (J.S. App. 90a-91a).

On January 30, 1984 Justice Embry filed another bad faith action in that same Circuit Court on behalf of himself and as a representative of a class of all other Alabama state employees

insured under a group plan by Blue Cross-Blue Shield of Alabama ("Blue Cross") alleging, *inter alia*, a failure by Blue Cross to pay in full various claims filed for him and his late wife, a custom of paying in claims only a portion of the actual charges, unreasonable delay in paying claims, and a "conscious, willful and intentional and fraudulent plan or scheme [to withhold] payment of valid claims for unreasonable lengths of time and in so doing, unlawfully [to enrich] itself." (J.S. App. 98a). The complaint alleged bad faith and sought "punitive damages for defendant's bad faith breach of contract" for Justice Embry and other members of the class. (J.S. App. 102a).

On April 4, 1984 the full court below *sua sponte* set aside the order of November 17, 1983 denying oral argument and ordered this case to be argued and submitted to the full court. (J.A. 1). On April 16, 1984 Justice Embry's bad faith action against Maryland Casualty was settled. (J.S. App. 85a). On May 14, 1984 this case was argued and submitted to the full court below. (J.A. 1).

Within several months after he brought his bad faith class action against Blue Cross, and extending for an eight-to-nine month period, Justice Embry engaged in drafting what was, at that time, a dissenting opinion in which he would have affirmed the judgment of the trial court in this case. (J.S. App. 167a-169a). During this same period, Justice Embry was also receiving "leads" from people with regard to his own bad faith action against Blue Cross, people he then put in touch with his attorney. (J.S. App. 206a-207a). Indeed, during this period Justice Embry was, in his own words, contacted by "[n]umerous [people who] have read about [his] lawsuit and read some of the details and said that is typical of the way [they] have been treated." (J.S. App. 228a).

Sometime in November or early December of 1984, Justice Embry's dissenting opinion became the majority opinion in this case. (J.S. App. 168a-169a). On December 7, 1984 that newly prevailing opinion was handed down as a *per curiam*, unsigned opinion joined by four other Justices and Justice Embry. In

that opinion, the court below determined that "blind adherence to a directed verdict standard . . . . simply cannot be the law," (J.S. App. 29a), and rejected the proposition that "a partial payment of an insurance claim establishes an absolute defense to a bad faith refusal to pay action." (J.S. App. 32a).

On December 21, 1984 appellant filed a timely Application for Rehearing in the court below and on December 28, 1984 appellant timely filed its brief in connection with that application (J.S. App. 77a-84a), having been granted a seven-day extension of time in which to file that brief. (J.A. 1).

On January 10, 1985 Justice Embry was deposed in his case against Blue Cross. Admitting that the appellant's case was on rehearing before his court (J.S. App. 167a), Justice Embry nevertheless responded to questions directly related to his court's handling of, and deliberations regarding, appellant's case. In addition to the facts summarized above regarding his successful draftsmanship of the *per curiam* opinion and his simultaneous, active involvement in the prosecution of his Blue Cross case, Justice Embry laid on the public record his deep-seated hostility towards insurance companies based on his personal experiences over many years with alleged non-payment, partial payment and late payment of health insurance claims. (J.S. App. 166a, 173a).

On February 14, 1985 appellant first learned of Justice Embry's Blue Cross case. On February 21,1985 appellant filed two motions in the court below raising its federal constitutional challenge to Justice Embry's participation in the December 7, 1984 decision below and to his continued participation in the disposition of its Application for Rehearing. (J.S. App. 85a). On March 8, 1985 Justice Embry participated in the unanimous denial of appellant's motions related to his own disqualification and in the overruling by the court, on a five-to-four vote, of appellant's Application for Rehearing. (J.S. App. 64a, 65a).

On March 20, 1985 — five days before the mandate of the court below was to issue — appellant finally received, after strenuous efforts of its counsel (J.S. App. 133a, 137a-139a,

142a-144a), a copy of the official transcript of Justice Embry's January 10, 1985 deposition. On March 22, appellant laid this transcript before the court below and renewed all of its prior challenges to the judgment and Justice Embry's participation. (J.S. App. 132a *et seq.*).

At the same time, appellant filed a motion for a stay of the execution of judgment pending the timely docketing of an appeal in this Court. On March 25, 1985 the court below, with Justice Jones not participating, unanimously denied both of appellant's motions. (J.S. App. 74a-75a). Justice Powell subsequently granted a stay of the mandate.

SUMMARY OF ARGUMENT

I

Appellate jurisdiction over this case exists because appellant presented its constitutional challenge to § 12-22-72 in a manner completely consistent with an unbroken line of seventeen cases dating from 1861 decided by the court below under which constitutional and statutory issues regarding § 12-22-72 or its predecessors have been presented for the first time and decided after entry of the decision of the court below.

Appellant's constitutional challenge to the fairness of the hearing below was timely because it was presented and pursued as soon as the previously undisclosed and completely unanticipated basis for that challenge was discovered. Each of the Justices below participated individually and collectively in rejecting the Due Process Clause claim.

The timeliness of appellant's challenges to the judgment below under the Contract, Excessive Fines and Due Process Clauses, which were presented for the first time in its efforts to obtain a rehearing, is fully justified for purposes of this Court's deciding those challenges because the court below has no rule or practice precluding the raising of such challenges for the first time after entry of its decision in a case. Furthermore, appellant could not reasonably have anticipated that the court below would chart completely new legal territory and approve

previously unthinkable, unprecedented and disproportionate punitive damages. Nor could appellant have suspected that the vital legal issues presented in its case would be resolved by a Justice with not only a direct and personal stake in the outcome of those issues but also strong hostilities towards insurers. Finally, prudential considerations militate strongly in favor of the Court's deciding these substantial challenges to the $3,500,000 punitive damage award.

II

The unconstitutionality of § 12-22-72 is manifest under this Court's decided cases, particularly *Lindsey* v. *Normet*, 405 U.S. 56 (1972), because it erects an intolerable barrier to access to the justice system to one class of litigants of which appellant is a member, while imposing no comparable burden on other classes of litigants. The severe appeal penalty serves no legitimate end. It penalizes indiscriminantly the diligent and the dilatory, the serious and the frivolous, while allowing whole classes of unworthy appeals to proceed uninhibited.

III

The participation in the deliberation and the authorship of the court's *per curiam* opinion in this case by a Justice who was simultaneously prosecuting his own "bad faith" class action in an Alabama trial court raising legal issues identical to those decided by the *per curiam* opinion violated all tenets set forth in *In re Murchison*, 349 U.S. 133 (1955), as basic requirements of due process. By his actions, this Justice participated intimately and decisively in the resolution of issues in which he had direct pecuniary and fiduciary interests. By his actions, he effectively decided issues raised in his own litigation, thereby acting contrary to any plausible interpretation of the Due Process Clause. And by his own words, spoken under oath, this Justice displayed personal bias sufficient to disqualify him from participation in this case.

Six other Justices of the court below, having had their membership in a putative class seeking punitive damages brought to

their attention, gave no indication that they would withdraw from that class prior to the final decision of the case below. Thus, only the Chief Justice and one other Justice of the court below are presumptively in a position to adjudicate appellant's cause should further non-ministerial proceedings in this case be required by this Court's disposition of this appeal.

IV

The *dicta* in opinions of this Court suggesting that the Contract Clause does not control judicial action cannot be applied to the creation and retrospective imposition by state courts of common law causes of action which seriously impair the obligations of contracts. The express prohibition in the Contract Clause against a state "Law" which impairs the obligation of contracts should not be interpreted to exempt one of the primary sources of state law. The Framers of that Clause and the Members of the First Congress understood that their use of the word "law" in the Constitution and in statutes referencing state law presumptively comprehended state common law. Further, the word "law" as defined under English common law clearly comprehended both statutory and common law. As this Court has made clear, the Framers of the Constitution were familiar with English common law, and this Court has frequently looked to English common law to determine the meaning of words in the Constitution. *E.g.*, *Ingraham* v. *Wright*, 430 U.S. 651, 661 (1977).

So interpreted, the Contract Clause was violated by the action of the court below in imposing retrospectively a severe burden on the contract at issue in this case in the form of a cause of action providing for virtually unlimited punitive damages which did not exist until years after the contract was executed and performed.

V

Under Magna Carta, English common law and the English Bill of Rights of 1689, punitive damage awards assessed in civil litigation were regarded as "fines" as that word was understood

by the Framers of the Excessive Fines Clause. Magna Carta, the English Bill of Rights, the Virginia Declaration of Rights and, finally, the Bill of Rights, prohibited "excessive fines." Excessive fines were understood from the beginning to be those which were disproportionate. Based on this history, cases in this Court applying the Cruel and Unusual Punishments Clause in parallel fashion to punishments administered in criminal and non-criminal proceedings, and the avowedly punitive purposes of the $3,500,000 award against appellant in this case, the Excessive Fines Clause should be held applicable to this punitive damage award. Once applied, there is no doubt that the gross disproportionality between that award and the contract damages sustained — a ratio of over 2,000-to-1 — violates the Excessive Fines Clause.

The punitive damage award in this case is manifestly inconsistent with nearly all concepts of due process. It was extravagantly disproportionate, imposed pursuant to a cause of action and standards of conduct which did not exist at the time the conduct to which it is now applied occurred, serves no legitimate state purpose except that of providing a windfall to appellees, and is administered as a part of a capricious, arbitrary process susceptible to emotional and passionate reactions rather than the application of known legal standards. This Court and its members have laid increasingly bare over the last decade the incongruity between such uncontrolled (and uncontrollable) punitive damage awards and the fair administration of justice. *E.g., Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-13, slip op., at 6 n.4, 53 U.S.L.W. 4866, 4874 (June 26, 1985) (Brennan, J., dissenting). The irrationality of the award in this case requires this Court finally to intervene under the Constitution.

ARGUMENT

I

THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE ALL FOUR OF THE QUESTIONS PRESENTED

Since enactment of § 25 of the Judiciary Act of 1789, this Court has, under specified circumstances, possessed statutory

jurisdiction over any "final judgment or decree in any suit" in the highest court of a State in which the suit could be brought. 1 Stat. 73, 85. The present formulation of this provision grants the Court power to review such final judgments where the validity of a statute is drawn into question on constitutional grounds and the decision is in favor of its validity or where any title, right, privilege or immunity is set up or claimed under the Constitution. 28 U.S.C. § 1257(2), (3).

As these statutes implement, and as Art. III, § 2 of the Constitution provides, this Court is given power over cases, not issues or questions. Therefore, for example, dismissal of an appeal is appropriate only in the "total absence . . . of *any* question . . . which would give this court jurisdiction." *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 240, 263 (1836) (emphasis added).

Of course, for the Court to have jurisdiction over a case, either the constitutionality of a statute must be "drawn into question" or a right, title, privilege or immunity under the Constitution must be "set up or claimed." The Court has determined that this standard is met where a question has "been *either* raised or squarely considered and resolved in the state court." *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983). While some earlier cases suggested that the inquiry under this "neither pressed nor passed upon" rule was jurisdictional, *id.*, at 219, and while decisions of this Court have been, on this point, "in some respects not entirely clear," *id.*, at 218, the Court's most recent decisions stand for the proposition that the "neither pressed nor passed upon" rule serves only as a prudential restriction on this Court's power to decide questions presented by cases over which this Court otherwise has statutory jurisdiction. *See Vachon* v. *New Hampshire*, 414 U.S. 478 (1974); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949). Thus, where the Court has jurisdiction over a case because at least one federal question has been properly pressed or otherwise passed upon, the Court may consider other constitutional questions raised in that case provided prudential concerns do not counsel otherwise.

Appellant will demonstrate that all four of its questions were properly presented below and that, even if this Court should hold otherwise with respect to one or more of those questions, the relevant prudential considerations militate in favor of consideration of those questions in this case.

A. The Appellate Question

Appellant undeniably challenged, in its Brief filed in connection with its Application for Rehearing, the constitutionality of § 12-22-72, *Code of Alabama* (1975), by asserting its right to "due process and . . . equal protection . . . protected by the Fourteenth Amendment of the Constitution of the United States." (J.S. App. 81a).[1] In overruling the Application for Rehearing without opinion by a five-to-four vote, the court below did not state whether it "considered and resolved" this constitutional challenge. However, there can be no serious argument over the fact that appellant presented its challenge to § 12-22-72 in a manner consistent with at least 124 years of established practice in the court below.

Starting with its decision in *Lawrence* v. *Jones*, 37 Ala. 388 (1861), the Supreme Court of Alabama has entertained and decided constitutional challenges to, and questions involving the interpretation of, § 12-22-72 or its predecessors in no fewer than seventeen cases in which those questions were presented for the first time after the court below had rendered its decision in those cases.[2] As recently as 1971, the court below entertained and overruled on the merits a challenge to § 12-22-72 under the Equal Protection Clause which was raised for the first time after the court's decision in the case. *Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1971).

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[1]Under Rule 20, Ala. R. App. P., it is sufficient that "issues presented on appeal [are presented] in the appellant's brief." As stated in the committee comments on Rule 20, that Rule "emphasizes the spirit in which these rules are intended to operate: to reach the merits of litigation."

[2]The sixteen cases in addition to *Lawrence* v. *Jones* are cited in appellant's Jurisdictional Statement at 12 & n.5.

In not a single one of these seventeen cases has the court below ever suggested that questions related to § 12-22-72 should, let alone must, be raised in that court prior to its final decision in a case potentially implicating that statute. The uniformity of this practice is consistent with the fact that the non-discretionary imposition of its ten percent penalty may be viewed as not at issue or reduced to any appealable order until the trial court's judgment is affirmed.

The action of the court below in overruling appellant's Application for Rehearing does not provide any basis for inferring an intent on its part to depart from this extraordinarily long and uniform practice even assuming, *arguendo*, that such a departure would be recognized as depriving this Court of appellate jurisdiction over this case under all the circumstances present here and as discussed more particularly below with respect to this Court's power to decide Questions 3 and 4.

This Court has made clear that state court procedural barriers to consideration of federal questions must be "strictly or regularly followed" in order to deprive this Court of its power to review substantial federal questions. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). Here, there is no such barrier; refusal of this Court to take appellate jurisdiction over this case would require the Court to go beyond repudiation of the principle established in *Barr* and the cases cited therein.

B. The Disqualification Question

The order entered by the court below on March 8, 1985 denying appellant's Motion for Disqualification reads, in pertinent part, as follows:

> "[T]he Court is of the opinion that . . . each justice should vote individually on the matter of whether or not he or she is disqualified and should recuse. Each Justice having voted not to recuse . . . ."

(J.S. App. 64a). On its face, this order establishes that the "court" below, albeit on a Justice-by-Justice basis, considered and reached the *merits* of appellant's challenge to the qualifica-

tions of Justice Embry and the other eight Justices as members of the putative class Justice Embry purported to represent in his bad faith action against Blue Cross. Inasmuch as appellant's Motion for Disqualification was expressly based on the Due Process Clause of the Fourteenth Amendment (J.S. App. 87a-88a, 124a-125a), the "court" necessarily reached and decided this federal constitutional question against appellant. Thus, it cannot plausibly be argued that the refusal of eight of the Justices below to pass on Justice Embry's qualifications (or on one another's) constituted a "non-decision" of that question for purposes of this Court's jurisdiction or that this question was not otherwise properly presented.

C. The Contract Clause and Excessive Fines Clause Questions

Appellant submits that once this Court satisfies itself that it has jurisdiction over a *case* under either 28 U.S.C. § 1257(2) or (3), then the question of the propriety of its deciding other federal questions brought by an appellant or petitioner to this Court in that case raises only prudential concerns. However, before addressing the prudential considerations relevant to this Court's reaching Questions 3 and 4, appellant will briefly demonstrate that the presentation of each of these questions, standing alone, would warrant this Court's taking jurisdiction over this case.

The general issue raised by both Questions 3 and 4 is whether appellant's raising them after the December 7, 1984 decision of the court below was timely. As appellant demonstrated above with respect to the practice of the court below as regards its entertaining questions for the first time after its decision in a case implicating § 12-22-72, and as appellant has previously demonstrated in its Jurisdictional Statement, at 14-15, and Reply Memorandum, at 3-5, *if* there is *any* rule in the court below on this general timeliness issue, that rule would not have precluded the presentation of Questions 3 or 4 after the December 7, 1984 decision. Furthermore, no such

rule was invoked by the court below in overruling appellant's Application for Rehearing.

In any event, appellant submits that there are few cases ever likely to be brought to this Court in which the doctrine of "surprise" might be more appropriately applied to compel the Court's consideration of substantial and important federal constitutional questions which were not raised until after the initial decision of the state court was rendered. Under that doctrine, as articulated in cases such as *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930), and *Saunders* v. *Shaw*, 244 U.S. 317 (1917), this Court clearly has the power to decide Questions 3 and 4.

Prior to the affirmance of this $3,500,000 punitive damage verdict on December 7, 1984: (1) the largest punitive damage award affirmed in a bad faith action by the court below, with or without remittitur, was $100,000, *Gulf Atlantic Life Insurance Co.* v. *Barnes*, 405 So.2d 916 (Ala. 1981); (2) the court below had *never* affirmed a punitive damage award in a bad faith case in which a partial payment had been made; and (3) *no* punitive damage award had ever been affirmed by the court below where the contract issue had been sent to the jury for decision. Furthermore, while fraud and conspiracy counts against appellant had been withdrawn by the appellees prior to trial, the December 7, 1984 *per curiam* opinion, authored by Justice Embry, purported to find appellant guilty of fraudulent conduct in four passages (J.S. App. 22a, 35a, 36a and 37a), and a conspiracy in two passages (J.S. App. 33a, 35a).

Finally, the greatest, and a completely unforeseeable, development in this case was the discovery that the major changes in Alabama law brought about by the December 7, 1984 decision were perhaps rooted in the participation in the case by a Justice with strong pecuniary, fiduciary and emotional interests in the rulings of law contained in the "*per curiam*" opinion which he had drafted.

Appellant concedes that this Court's assumption of jurisdiction over Questions 3 and 4 would probably do little to clarify

the occasions on which this Court will or will not invoke the doctrine of surprise in the future, or, as regards Question 3, will invoke the doctrine of *Dewey* v. *Des Moines*, 173 U.S. 193 (1899), under which this Court may decide a question that is no more than an "enlargement" of a question otherwise properly presented to a state court. *Cf. Illinois* v. *Gates*, 462 U.S., at 220. This is because appellant assumes that the series of highly unusual events which have occurred in this case, once corrected by this Court, would presumably never again be duplicated in the administration of justice in any court system in the United States. Unless, however, this Court is prepared to repudiate altogether the doctrine of surprise, it should regard itself as having the power to decide these questions.

Finally, prudential considerations dictate that the Court reach and resolve Questions 3 and 4. The concern raised in *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969), is inapplicable because the record provides a fully adequate basis on which to decide these purely legal questions.

Nor are the other prudential concerns set forth in *Webb* v. *Webb*, 451 U.S. 493, 500-01 (1981), applicable here. Section 12-22-72 cannot be construed so as to avoid the constitutional issue it raises, and in any event appellant fruitlessly gave the court below no fewer than three opportunities to do so. Nor are there any credible independent or adequate state grounds upon which any of the four questions here could have, and would have, been decided favorably to appellant by the court below. Eight Justices of that court, given two opportunities by appellant, refused to pass on the qualifications of Justice Embry even though appellant raised what should have been dispositive *state* law objections to his participation in this case as well as its federal constitutional objections. The court below, having three opportunities to do so, was unwilling to act on appellant's Excessive Fines Clause argument even though appellant had argued for remittitur as a matter of *state* law.

Nor, having three opportunities to do so, did the court below indicate any concern about the retrospective imposition on

appellant of a $3,500,000 punitive damage award based upon a cause of action that did not exist when the contract was executed and performed and upon the application of newly formulated rules under that cause of action. It would be disingenuous to suggest that the court below was or is prepared to constrain its development of common law torts in Alabama, and particularly the award of large punitive damage judgments, by subjecting that development to the constraints which would be imposed on that development by the interpretations of the Contract Clause and the Excessive Fines and Due Process Clauses which appellant advanced below and advances here. In addition, because Questions 3 and 4 present issues of first impression in this Court, and because the construction of the Contract and Excessive Fines Clauses urged by appellant arguably is contrary to *dicta* in prior opinions of this Court, customary principles of comity are inapplicable because there would be "little point in requiring a litigant to request a state court to overrule or modify one of this Court's precedents." *Illinois* v. *Gates*, 462 U.S., at 251 (White, J., concurring in the judgment).

Finally, the concern for this Court's own workload, *Webb* v. *Webb*, 451 U.S., at 501, militates strongly in favor of resolution now of Questions 3 and 4. There can be no doubt that, having determined to hear argument on Questions 3 and 4, a failure by this Court to address and resolve those questions will predictably result in the presentation of those questions in other cases. Such litigation would be essentially senseless, generating ultimately both a greater workload for this Court in entertaining future cases and in state courts all over the country. Either the Contract Clause controls the retrospective imposition on contracts of newly recognized, judicially created causes of action providing for unbargained-for remedies in the form of virtually unlimited punitive damages, or it does not. Either the Excessive Fines Clause is applicable to grossly disproportionate awards of punitive damages in judicially created civil actions, or it is not. Either the Due Process Clause precludes the administration of punishment after a civil trial based on sub-

stantive rules that were nonexistent at the time the acts complained of were committed, or it does not.

II

SECTION 12-22-72, *CODE OF ALABAMA* (1975), ON ITS FACE AND AS APPLIED, VIOLATES THE EQUAL PROTECTION CLAUSE

A. Section 12-22-72 Violates the Equal Protection Clause Under Any Standard of Review

Section 12-22-72 of the Code of Alabama imposes an automatic ten percent penalty on an unsuccessful money-judgment appellant. This impost, paid to the appellee, is assessed irrespective of the merits of the appeal. Litigants other than those against whom money judgments have been entered are not exposed to any comparable penalty.

Because Alabama's appeal penalty manifestly places a substantial burden on the exercise of the statutory right of appeal by some appellants in Alabama without imposing *any* like burden on other appellants, it would appear that a majority of this Court would scrutinize it under "more powerful scrutiny than the minimal rational-basis test used to review classifications affecting only economic and commercial matters." *City of Cleburne* v. *Cleburne Living Center*, No. 84-468, slip op., at 4, 53 U.S.L.W. 5022, 5029 (July 1, 1985), (Marshall, J., concurring in the judgment in part and dissenting in part); *id.*, slip op., at 3-4, 53 U.S.L.W., at 5027 (Stevens, J., concurring). However, § 12-22-72 is unconstitutional even under the rational-basis test as applied by a majority of the Court in *City of Cleburne* because the provision's irrationality and discriminatory impact are obvious and unjustifiable.

B. Section 12-22-72 Places a Substantial and Unequal Burden on a Class of Appellants

That § 12-22-72 indisputably results in the unequal treatment of litigants in Alabama in their access to Alabama's appellate courts requires little discussion. In fact, appellees in this case took two prior appeals without any exposure to a massive

penalty if their appeals had been rejected. Plaintiff-appellants who seek to recover a money judgment from defendants can do so without risk in Alabama except for the potential application to them, as with any appellant, of Rule 38, Ala. R. App. P., for damages and costs if the affirming court finds the appeal to have been frivolous. Defendant-appellants in the same cases are subjected to the additional *in terrorem* effect of an obligatory ten percent forfeiture which increases the risks of an appeal, no matter how meritorious, in direct proportion to the amount at stake. Thus, the disincentive to appeal increases just as the sting of the judgment increases. A large judgment therefore carries its own inducement to refrain from exercising the right of access to the appellate courts.

C. The Unequal Burden on the Right to Appeal Imposed by § 12-22-72 Is Irrational, Arbitrary and Unconnected to Any Legitimate State Interest

Absent the special considerations associated with this Court's historic concerns regarding equal access to *appellate* courts, *see Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972) *and cases cited*, the inquiry under the Equal Protection Clause is whether a classification is "rationally related to a legitimate state interest," *City of Cleburne* v. *Cleburne Living Center*, slip op., at 6, 53 U.S.L.W., at 5023. Section 12-22-72 bears no rational relationship to any legitimate state interest.

The initial difficulty in evaluating § 12-22-72 is to identify any "state interest" which that statute may have been enacted to serve. Even the Supreme Court of Alabama has strained to identify any purpose. For example, in *Snellings* v. *Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934), that court observed that, while it had previously articulated the intent of § 12-22-72 to be "to penalize frivolous or delay appeals," it had not intended in that prior case to suggest that "such was its only purpose." The remainder of the opinion in *Snellings*, however, is devoid of any suggestion as to what other purpose might be served by § 12-22-72.

If, as indicated by *Snellings*, the purpose of § 12-22-72 is to penalize frivolous or dilatory appeals, and if, as is plain from the face of that statute and from *Snellings* itself, in imposing the penalty no judicial inquiry is to be made into whether a particular appeal was frivolous or taken for purposes of delay, then § 12-22-72 is arbitrarily overinclusive in that it sweeps within its reach non-frivolous appeals which could not remotely, as in the case at bar, be regarded as having been taken for the purpose of delay. At the same time, § 12-22-72 is arbitrarily underinclusive in that it does not apply at all to a frivolous or dilatory plaintiff-appellant, or to the whole range of similarly situated potential non-money-judgment defendant-appellants.

Finally, if it is intended to address frivolous appeals, § 12-22-72 overrides and nullifies Rule 38, Ala. R. App. P., under which all appellants who take frivolous appeals may be appropriately penalized after a judicial determination that the appeal was frivolous.[3] Appellant submits that the juxtaposition of § 12-22-72 and Rule 38 is irrefutable evidence of the irrationality of the former. *See United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 536-37 (1973).

The court below has also suggested that a purpose of § 12-22-72 is to provide *appellee litigants* with "additional damages." *City of Birmingham* v. *Bowen*, 254 Ala. 41, 47, 47 So.2d 174, 180 (1950). But neither *Bowen* nor any other case in the court below articulates any identifiable state purpose in providing a mandatory, arbitrary amount of "additional damages" to one class of litigants to be collected from another class of litigants whose appeals were neither frivolous nor taken for the purpose of delay. These "additional damages" are

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[3]Rule 38 has been interpreted to permit the award of court costs (normally a nominal figure), and "damages" which, on one occasion, were assessed by the court below as $500 for the taking of a frivolous appeal. *See RMP, Inc* v. *Arledge*, 417 So.2d 158 (Ala. 1982). This $500 award would appear to be the highest award ever entered under Rule 38, making the penalty imposed on appellant under § 12-22-72 some 700 times greater than that award even though appellant's appeal was, by no rational measure, frivolous.

just that, and nothing more, because interest is separately assessed (presently at the rate of twelve percent per annum) against any appellant, if a money judgment is affirmed, pursuant to Rule 37, Ala. R. App. P., and § 8-8-10, *Code of Alabama* (1975).

In fact, the only consequence of § 12-22-72 is to provide an "automatic assessment of unproved damages," *Lindsey* v. *Normet*, 405 U.S., at 78, as a windfall to one class of litigants whose property interests in the money judgment are already fully protected by a supersedeas bond and the accrual of interest on their judgment, while the costs borne by another class of litigants — appellee-defendants — in defending non-frivolous appeals are not compensated in any manner whatsoever.

Assuming, *arguendo*, that this "automatic assessment" and the state "interest" behind it are somehow "rational," it is clear that they are insufficient to sustain § 12-22-72 under this Court's decision in *Lindsey* v. *Normet*. As the Court stated in *Lindsey*, a State may employ "reasonable procedural provisions to safeguard litigated property . . . or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends." 405 U.S., at 78. As demonstrated above, § 12-22-72 is not "reasonably tailored" to serve any identifiable state interest not already served by other statutes and rules. The ten percent penalty assessed under § 12-22-72 does nothing more than up "the stakes," *id.*, at 79, and is no different in kind from the unproved punitive damages imposed by the jury in this case.

III

THE PARTICIPATION OF JUSTICE EMBRY IN THE CONSIDERATION AND DECISION OF THIS CASE VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR HEARING OF ITS APPEAL

While this case was before the Supreme Court of Alabama, Justice Embry of that court engaged in a series of acts which compel the conclusion that he had a direct, pecuniary interest

in the outcome of this case. Indeed, and unfortunately, his conduct permits the inference that portions of the *per curiam* opinion below were written with the knowledge that they might well enhance the likelihood of recovery of punitive damages in his Blue Cross case. In addition, Justice Embry's conduct must be evaluated in the larger context of the alleged difficulties he had had over many years with partial and non-payment of his own claims against insurance companies. If conduct of this nature by a Justice of the highest court of a State can escape correction, both the appearance and the reality of constitutional fairness in the disposition of appellate cases, which is central to the integrity of the administration of justice, will be irreparably damaged.

Justice Black articulated in four simple, declarative sentences the constitutional considerations applicable to Justice Embry's conduct in this case:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In re Murchison, 349 U.S. 133, 136 (1955).

The three principles articulated by Justice Black are clear: (1) no judge may have actual bias; (2) no judge may be the judge of his or her own cause; and (3) no judge may decide cases in which he or she has an interest in the outcome. As appellant will demonstrate, the indisputable facts before this Court in this case establish that Justice Embry's participation in this case violated all three of these constitutional principles, the violation of any one of which would be a sufficient basis for reversal of the judgment below.

A. Justice Embry's Direct, Personal Interest in the Outcome of This Case Violated Appellant's Rights Under the Due Process Clause

Until appellant received and understood the implications of the contents of the transcript of Justice Embry's deposition,

appellant's challenge to Justice Embry was based largely on the inescapable identity between the legal issues decided in its case and the issues necessarily raised by Justice Embry's bad faith action against Blue Cross.

This identity of issues goes well beyond the fact that Justice Embry, as a Justice whose vote was necessary to the outcome of appellant's appeal, had himself filed two bad faith actions against insurance companies and was actively involved in the prosecution of at least one of those actions during the time he was drafting the opinion below:

(1) In his complaint against Blue Cross, Justice Embry sought punitive damages for partial payment of claims (J.S. App. 98a). Until the decision below, the Supreme Court of Alabama had erected what appeared to be an insurmountable barrier to punitive damages where partial payment had been made, a barrier never breached until December 7, 1984.

(2) The Blue Cross complaint sought compensatory damages for breach of contract and punitive damages. Until December 7, 1984, Justice Embry would first have had to prevail on his contract claims as a matter of law in order to recover punitive damages for himself and the class he purported to represent.

(3) Until the decision below, the largest punitive damage award ever affirmed by the court below with or without remittitur was $100,000. The affirmance of the $3,500,000 punitive damage award in this case had the immediate effect of enhancing materially both the jury potential and settlement value of his own case.[4]

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[4]This phenomenon is observable in the history of this litigation. As the tort of bad faith went from non-recognition in 1978 in Alabama to the decision in this case, appellees' prayer for punitive damages correspondingly escalated from an initial $2,200,000 to $4,000,000 to $30,000,000. (J.A. 8-10, 17-21, 24-30). *See also* Morrison, *Punitive Damages and Why the Reinsurer Cares*, XX *The Forum* 73, 74-75 & nn.8-10 (ABA Fall 1984).

(4) The *per curiam* opinion's characterization on four occasions of appellant's conduct as fraudulent (J.S. App. 22a, 35a, 36a, 37a), despite the withdrawal of fraud counts against appellant prior to trial, neatly matched the fraud allegations in the Blue Cross complaint. (J.S. App. 98a).

In addition to these specific points at which Justice Embry's complaint intersected the *per curiam* opinion, he clearly had a general, direct and substantial interest in any expansion of the tort of bad faith which could enhance the settlement value or potential recovery in his case.

As this Court observed in *In re Murchison*, the "interest" in the outcome of a case which will constitutionally disqualify a judge "cannot be defined with precision. Circumstances and relationships must be considered." 349 U.S., at 136. The general test laid down by this Court is whether the "situation is one 'which would offer a possible temptation to the average man as a judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972), *quoting Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927).

Although both *Ward* and *Tumey* were criminal cases, this Court squarely reaffirmed their principles and applied them to affirm the disqualification of the members of a state board of optometry who stood to benefit monetarily, to an uncertain degree, from their performance of an administrative adjudication. *Gibson* v. *Berryhill*, 411 U.S. 564, 578-79 (1973).

It is particularly relevant here that this Court's affirmance in *Gibson* v. *Berryhill* of the court's holding below regarding the pecuniary interests of the board members was apparently based upon that lower court's presumption — as opposed to a proven fact — that the board members would realize personal gain. *See Berryhill* v. *Gibson*, 331 F. Supp. 122, 126 (M.D. Ala. 1971) (three-judge court). In this case, whether Justice Embry or the class he purported to represent ultimately would have benefitted from the decision in this case cannot be known because that litigation was dismissed, without any apparent notice to the members of the putative class, on April 16, 1985.

(App. 3a-4a, *infra*). There can, however, be no doubt that Justice Embry had direct pecuniary and fiduciary interests in the outcome of this case during virtually the entire time in which it was *sub judice* in the court below.

B. Justice Embry, By His Participation in This Case Below, Effectively Was Sitting as Judge in His Own Cause in Violation of the Due Process Clause

The participation of Justice Embry in this case created the potential of his actually deciding, in advance, issues in his own litigation pending at the time he wrote the *per curiam* opinion.

As enunciated by this Court as a constitutional principle and by courts everywhere which have addressed comparable situations as matters to be resolved on the basis of non-constitutional rules and plain common sense, "[n]o man can be a judge in his own cause." *Earl of Derby's Case*, 77 Eng. Rep. 1390 (K.B. 1614) (Lord Coke).[5]

Justice Embry presumably would have disqualified himself if his Blue Cross case had been subsequently pursued to a verdict and appeal. Indeed, under Alabama precedent the entire court below might have disqualified itself. *See Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967). However, even assuming disqualification of all members of the court below in such a situation, Justice Embry would still have managed to become the judge in his own cause because any "temporary" court constituted to dispose of the Blue Cross appeal would presumably apply the law of Alabama as they found it, just as the Circuit Court of Jefferson County would have been obliged to do.

This perversion of the concept of a fair trial in a fair tribunal should be declared unconstitutional at the outset. The potential that a judicial opinion has been affected by a judge's own

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[5]In an early 18th-century English case, Chief Justice Holt made reference to yet another English case in which a judge was "laid by the heels" for deciding a case to which he was a party. *Wright* v. *Crump*, 87 Eng. Rep. 1055, 1056 (Q.B. 1702).

pending litigation raising the same or similar legal issues clearly deprives a party in appellant's position of a fair hearing. Whether Justice Embry might or might not have realized pecuniary gain is legally irrelevant.[6]

C. Justice Embry's Conduct Constitutes Actual Bias in Violation of Appellant's Rights Under the Due Process Clause

An allegation of actual bias, because it necessarily challenges the personal integrity of a sitting judge, should not be, and has not been, lightly entertained by this Court. *See generally Gibson* v. *Berryhill*, 411 U.S., at 579 (refusal of Court to pass on finding by court below of actual bias in decisionmakers).

The integrity of one judge of an appellate court is, however, a possible reflection of the integrity of that particularly collegial body and, more importantly, a reflection on the integrity of the process by which justice is meted out in our legal system. As Chief Justice Torbert (J.S. App. 66a) commented in his opinion specially concurring in the denial of appellant's first motion to disqualify Justice Embry:

> "It is indeed unfortunate that the litigation has resulted in a serious charge impugning the honesty and integrity of the Court and its members."

Whatever may have been meant by this comment, it *is* indeed unfortunate that a situation even approaching the gravity of this disqualification problem and its reflection on the court below was thrust upon appellant as an issue in this case. However, it would be even more unfortunate for the long-term administration of justice in this country if appellant were to be returned to the courts of Alabama in this case unless every vestige of bias against it is removed.

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[6]Because the principle that no man may be a judge in his own cause is so fundamental to any decent conception of the fair administration of justice, cases actually raising such a fact pattern appear to be quite rare. *See Middletown National Bank* v. *Toledo, A.A. & N.M.R.R.*, 105 F. 547 (C.C.S.D.N.Y. 1900).

It is rare that the actual bias of a sitting judge can be established by his own words. *Berger* v. *United States*, 255 U.S. 22, 32-36 (1921), presented such a situation. In that case, this Court acted swiftly and decisively — in the face of timidity by the court of appeals — to make clear that two criminal defendants of German ancestry could not be subjected to having their cause tried by a judge who had publicly slurred peoples of Germanic origin.

Any hostility or prejudice in a judge towards ethnic or racial groups is intolerable. And, while the same hostility or prejudice directed towards a corporation or industry may not rise to quite the same level, any litigant is surely entitled not only to justice but the appearance of justice: "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 150 (1968).

The transcript of Justice Embry's deposition testimony stands, with every inference drawn charitably in his favor, as evidence of judicial prejudice against a sector of corporate America. The verbatim transcript of that deposition is set out in an appendix to the Jurisdictional Statement. (J.S. App. 145a-265a).

There is, unfortunately, more to appellant's challenge than Justice Embry's deposition and his conduct detailed above. From the face of their opinions specially concurring in the denial of appellant's initial Motion for Disqualification, it seems apparent that Chief Justice Torbert and Justice Maddox had been unaware of Justice Embry's litigation against Blue Cross in which they were putative class members. It is unclear, on the record before this Court, whether any of the other six Justices were aware of that litigation, and appellant is understandably reluctant to draw any inferences on that issue. However, as far as the record reflects, *only* Chief Justice Torbert and Justice Maddox announced their intent to withdraw as members of that putative class prior to the settlement of that litigation on

April 16, 1985. (J.S. App. 66a, 69a; App. 4a). If, contrary to appellant's arguments advanced with regard to Questions 1, 3 and 4, appellant is not constitutionally entitled to outright and final reversal of the judgment below, this Court must set forth the conditions under which appellant's cause is to be reheard. The importance of a decisive response by this Court goes well beyond the immediate and substantial interests of appellant:

> "Time and experience have demonstrated that the *public*, as well as litigants, will tolerate the honest mistakes of those who pass judgment, but not the biased acts of those who would deprive litigants of a fair and impartial trial. Foremost among the responsibilities imposed upon a reviewing court is to make sure that this foundation of our judicial system be not undermined."

Inland Steel Co. v. *NLRB*, 109 F.2d 9, 20 (7th Cir. 1940) (emphasis added). No Justice of the court below who did not withdraw from the putative class is constitutionally in a position to sit in judgment of appellant at any time in the future in this case.

IV

THE RETROSPECTIVE IMPOSITION OF PUNITIVE DAMAGES UNDER A NEW CAUSE OF ACTION VIOLATES APPELLANT'S RIGHTS UNDER THE CONTRACT CLAUSE

On May 5, 1981, the Alabama legislature and governor cooperated in the enactment into law of a statute, § 27-1-17, *Code of Alabama* (1975), which created a statutory right of action for persons who believed they had been wrongfully denied payment on health or accident insurance claims. Under that law, a successful plaintiff is entitled to recover the denied payment plus one and one-half percent of the amount of the claim for each month the claim remains unpaid. App. 2a, *infra*.

On October 2, 1981, the Supreme Court of Alabama, through the vehicle of several opinions issued that day, *see* pp. 3-4, *supra*, effectively overrode the Alabama legislature's pol-

icy judgment by enacting into the common law of Alabama a cause of action for tortious bad faith failure to pay an insurance claim. In an exercise of pure policymaking analytically indistinguishable from the policymaking that led to enactment of § 27-1-17, the court below also created a remedy for wrongful denial of an insurance claim—punitive damages in amounts limited, for the most part, only by the imaginations of juries.

At the time this bad faith action was created and during the ensuing three years, the Supreme Court of Alabama developed a number of rules under which bad faith actions were to be litigated, including the rule that partial payment of a claim could be expected to preclude a punitive damage award and the limitation that punitive damages would not be imposed unless a plaintiff could show entitlement to recovery as a matter of law on the contract claim.

On December 7, 1984 the court below ratified the sentiments of a jury that appellant should be punished in the amount of $3,500,000 for a breach in 1977 and 1978, resulting in $1,650.22 in damages, of a contract which had been executed in 1967. Between 1967 and 1978, appellant could not possibly have known that this contract carried this level of exposure and could not have known what Alabama required of it in processing insurance claims to avoid the risk of punitive damages because there was *no* Alabama law on the subject at that time. When, in 1981, the Alabama legislature did impose an extra obligation on insurance contracts requiring prompt payment of claims, it did so by selecting a reasonable and proportionate remedy. But even prescience by appellant as to Alabama's subsequent enactment of a statutory remedy would have been a wholly misleading exercise in light of the draconian and retrospective revision of Alabama law five months later by the court below.

It cannot be seriously doubted that, had the Alabama legislature enacted in 1981 the tort of "bad faith" as it has evolved in the court below since then, retrospective application of that statute to contracts entered (and performed) years before

could not survive a challenge under the Contract Clause. The question is whether Alabama can accomplish this otherwise unconstitutional result by virtue of the fact that its judicial — rather than its legislative — branch created this new and substantial retrospective obligation.

A. The Contract Clause Should Be Applied to Judicial Action Which Is Essentially Legislative in Character

In *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), this Court had before it the question whether a substantial change in construction given to an Oklahoma statute by the highest court of that State constituted an impairment of obligations under the Contract Clause. A statute had been reinterpreted by that court subsequently to the execution of a contract to take on a substantially different meaning affecting existing obligations under the contract.

This Court held that such a reinterpretation of a state statute would not violate the Contract Clause, stating:

> "It has been settled by a long line of decisions, that the [Contract Clause] is directed only against impairment by legislation and not by judgments of courts. The language — 'No State shall . . . *pass any . . . law* impairing the obligation of contracts' — plainly requires such a conclusion."

263 U.S., at 451 (emphasis added by the Court) (footnote omitted). On its facts and as properly understood in the context of every one of the prior decisions relied upon in it, *Tidal Oil* did not decide, nor could it have decided, the extent to which the Contract Clause controls the power of state courts to impair the obligations of contracts pursuant to their exercise of common law power to create tort actions and accompanying remedies. *Tidal Oil* stands for no more than the proposition that reinterpretation by a state court of a statute does not implicate the Contract Clause. *See Stockholders of the Peoples Banking Co.* v. *Sterling*, 300 U.S. 175, 182 (1937).

The decision in *Tidal Oil* may be rationalized on the theory that the court is assumed previously to have misunderstood the

intent of the legislature in giving the statute its earlier interpretation. Thus, reinterpretation would clearly constitute the performance of a judicial function: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). The same rationalization is not available to insulate the creation of new, major additional remedies for breach of contract from Contract Clause scrutiny, because the state court would, by definition, be engaged in making new law with each such pronouncement. Each would be a classic exercise of policymaking associated with the legislative process: "Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter . . . ." *Id.*

Whether the Contract Clause should be construed to control the creation of new common law rights of action by state courts for breach of contract requires this Court to determine the meaning of the word "Law" as used in that Clause.

Although the debates in the Constitutional Convention support appellant's position regarding what the Framers meant by the word "Law" in the Contract Clause,[7] other highly relevant historical materials establish even more conclusively that it would be unreasonable to assume that the Framers would have intended to exclude common law as formulated by the state courts.

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[7]The concept of the Contract Clause was introduced at the Convention by Rufus King, who proposed language "in the words used in the Ordinance of Congs establishing new States." 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 439 (1911). The precise ordinance referred to was the Ordinance for the Northwest Territory. *See* B. Wright, *The Contract Clause of the Constitution* 6 (1938). As enacted in 1787 by the Congress convened under the Articles of Confederation, this provision stated that "no law ought ever to be made or have force . . . that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*." Art. II, 44 Stat. 1851, 1852 (pt. 1). This broad phraseology almost certainly swept within it judicial creation of common law obligations. Indeed, § 4 of that Ordinance expressly recognized the "common-law jurisdiction" being conferred on the judges of that Territory. *Id.*, at 1851.

There are at least three persuasive bases for believing that the word "Law" should be interpreted to include the laws made by state courts in the course of their exercise of common law "lawmaking" power.

(a) This Court has often recognized the relevance of the meaning at English common law of terms used in the Constitution to ascertaining the intent of the Framers, *see, e.g., Schick* v. *United States*, 195 U.S. 65, 69 (1904), and Solicitor General William Blackstone's *Commentaries* have been singled out as "the most satisfactory exposition of the common law of England." *Id.; see also Ingraham* v. *Wright*, 430 U.S. 651, 661 (1977). Blackstone's definition of the term "law" included both common law and statute laws:

> "The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law."

1 W. Blackstone, *Commentaries on the Laws of England* *63 (1765).

(b) The Framers used phraseology similar to that of the Contract Clause in another provision of the Constitution, the Supremacy Clause, Art. VI, cl. 2, which makes federal law supreme over "anything in the Constitution or Laws of any State." If this reference to the "Laws of any State" had been interpreted in the wooden fashion suggested by the *Tidal Oil* Court, it is easily imaginable that the Supremacy Clause, and therefore federal law, would be frequently subverted. The Supremacy Clause has, of course, been routinely construed to subordinate state common law to superior federal law. *E.g., Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). The available evidence is that the Framers intended no difference between the word "Laws" as it appears in the Supremacy Clause and the word "Law" in the Contract Clause.[8]

[8]On August 23, John Rutledge of South Carolina proposed to amend the Supremacy Clause as it was then drafted as Art. VIII. The Supremacy Clause both as it stood and as Rutledge proposed it to be amended contained the phrase "laws of the several States." 2 M. Farrand, *supra*, at 183, 389. On August 28, Mr. Rutledge, at the close of the only recorded substantive debate on the Contract Clause, proposed to insert the phrase "nor pass bills of attainder nor retrospective laws" into what was then Art. XII to embody the principle of the Contract Clause. *Id.*, at 440.

(c) Additional evidence of the Framers' understanding of the meaning of the word "Law" in the Contract Clause is provided by an examination of the manner in which that term was employed by the First Congress.

Section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 *(codified at* 28 U.S.C. § 1652), provides that, except where the Constitution, treaties or statutes of the United States otherwise require, "the laws of the several states . . . shall be regarded as rules of decision . . . in the courts of the United States." For almost a century, and not until fourteen years after it decided *Tidal Oil*, this Court labored under the assumption that the special Senate Committee of the First Congress which drafted § 34 did not mean the term "laws of the several states" to include the common law rules adopted by state courts. *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842).

A half century after *Swift* v. *Tyson*, Justice Field, writing alone in dissent, directly challenged this proposition: "The term 'laws' in the Constitution and the statutes of the United States is not limited solely to legislative enactments unless so declared or indicated by context." *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U.S. 368, 398 (1893) (Field, J., dissenting).

In 1938, this Court finally reversed the doctrine laid down in *Swift* v. *Tyson* on two grounds. First, as a matter of construing § 34, the Court accepted the conclusion of Professor Warren that the legislative history of § 34 established that its Framers intended the word "laws" to include "unwritten as well as written" laws. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 72-73 & n.5 (1938).[9]

That legislative history, as set out in Professor Charles Warren's article cited by the Court, established that the original

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[9]More than three decades before, Justice Holmes, also in dissent, restated the heart of Justice Field's criticism of *Swift:* "[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting, joined by Brandeis & Stone, JJ.), *as quoted in Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 79 (1938).

draft of what ultimately became § 34 was in the handwriting of Senator Oliver Ellsworth of Connecticut and that it expressly provided that a State's "unwritten or common law," as well as its statutes, would operate as rules of decision for federal courts in cases in which no federal constitutional, statutory or treaty provision itself provided the rule of decision. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 85-88 (1924).

Because Ellsworth and four other members of the Committee appointed to draft the Judiciary Act of 1789 had also served in the Constitutional Convention, they "were familiar with its intent as to the Judiciary." *Id.*, at 57 (footnote omitted). And, as this Court has observed, the Judiciary Act of 1789 is itself "weighty evidence" of the true meaning of the Constitution because it was "passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument." *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 297 (1888).

The inference to be drawn from both Professor Warren's research and this Court's acceptance of it in *Erie* is that Ellsworth and the First Congress understood that when they made reference to the "laws" of the several States, that reference included the common law of the States unless otherwise provided.[10] Therefore, *Erie* strongly supports the proposition that the First Congress and the Framers understood that a reference to "laws" or "law" would comprehend the common law of the several States as developed in their courts.

Second, the *Erie* Court observed that the power granted to federal courts under *Swift* v. *Tyson* had been construed broadly to declare " 'general law' [which had been] held to include the obligations under contracts entered into and to be performed within the State." 304 U.S., at 75 (footnote omitted). "[T]he

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[10]In a subsequent draft Ellsworth transformed the terms "Statute law" and "unwritten or common law" into a unitary concept — the "laws of the several States" — because in that era the term "laws of the several States" would be understood as comprehending the common law of each State. 37 Harv. L. Rev., at 86.

unconstitutionality of the course pursued has now been made clear . . . ." *Id.*, at 77-78. Thus, if Congress could neither have prescribed nor authorized the federal courts to prescribe a "federal general common law," *id.*, at 78, the Framers must, in § 34 of the Judiciary Act of 1789, the Supremacy Clause, and the Contract Clause, have focused upon the importance of the lawmaking power of the several States as had been, and would be, exercised by their state courts: "[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." 304 U.S., at 78.

Understood in this context as a case of constitutional imperative, 304 U.S., at 78-80, *Erie* is even more closely on point because disregard of the importance of the power of state courts to develop state common law subject only to constitutional restraints such as the First Amendment, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), would violate principles of federalism lying at the core of our Constitution. *Erie* recognized that the Framers, in their use of the word "Law" or "Laws," were supremely conscious of the lawmaking powers of the several States as those powers had been, and would be, exercised by their state court systems.

What the Framers of the Contract Clause surely recognized and what continues to be true to this day is that much of the substantive law of contracts in this country is shaped by the common law. *Cf. Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (Burger, C. J.) (plurality opinion) ("statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct"). To suggest that the Framers would have intended, by the use of the term "Law," to include only legislative enactments would necessarily suggest that whatever protection was being extended to the right of contract was not to be extended to the lawmaking bodies — state courts — in which the substantive rules of contract were most likely to be announced and, from time to time, changed. The burden to show that the Framers intended

such a result is on the appellees in this case, and it cannot be met.[11]

B. The Bad Faith Action Created in 1981 By the Supreme Court of Alabama Imposes, Retrospectively, an Unconstitutional Obligation on the Insurance Contract in This Case

This Court's recent decision in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), reaffirmed the general rule that the Contract Clause is not an absolute barrier to state action impairing the obligation of contracts and that "the absolute language of the Clause must leave room for 'the "essential attributes of sovereign power," . . . necessarily reserved by the States to safeguard the welfare of their citizens.'" *Id.*, at 244, *quoting United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21 (1977). Whether any particular state action violates the Contract Clause will depend on the "severity of the impairment" as balanced against the "nature and purpose" of the state action. 438 U.S., at 245.[12]

The severity of the impairment of appellant's contract with the City of Mobile is manifest both from the sheer size of the punitive damage award and because this new tort created a large number of contingent liabilities of unlimited scope with respect to insurance claims processed by appellant prior to the announcement of this potential liability. Appellant engages in

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[11]As detailed in notes 7 & 8, *supra*, it would be incorrect to attribute any significance to the incorporation of the Contract Clause into what was then Art. XII along with the Bill of Attainder Clause (and ultimately the Ex Post Facto Clause) so that the Contract Clause became an object of the verb "pass." John Rutledge, who first suggested the incorporation, 2 M. Farrand, *supra*, at 440, may reasonably be assumed to have been aware of the meaning of the word "laws" as it appeared in Art. VIII both before and after his proposed amendment to that Article on August 23, and there is no evidence that he intended a different meaning in his proposal to amend the language of the Contract Clause as it had been proposed by Rufus King on August 28.

[12]There is no argument that the Contract Clause does not constrain the power of the States to modify remedies as well as the substantive or procedural law of contracts. *See W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935).

business through literally thousands of contracts, and its calculation of premiums, reserves and other business risks are based upon its understanding of the general range of exposure it assumes under each of these contracts and the actuarial likelihood of claims under each contract. Adding a whole new spectrum of contingent liabilities with unanticipated financial consequences, as this Court has recognized, strikes at the very stability of contract which the Contract Clause protects:

> "These [pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect."

Los Angeles Dept. of Water & Power v. *Manhart*, 435 U.S. 702, 721 (1978), *as quoted in Allied Structural Steel Co.* v. *Spannaus*, 438 U.S., at 246-47.[13]

Measured against the severe disruption of appellant's settled contractual expectations manifested in the decision below is the interest of Alabama in exacting $3,500,000 from appellant and transferring that sum to appellees. For reasons discussed fully in part V B of this brief, Alabama's interest in exacting such a penalty through this tort action is of little or no weight even in the context of *prospective* application of that tort to

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[13]Under the contract at issue, the premium rates are increased or reduced as "warranted by experience or by reason of any change in factors bearing on the risk assumed." (J.A. 43). It is obvious that a new tort accompanied with potentially large liabilities at an uncertain time in the future would be difficult enough to factor into an experience rating system. To do so retrospectively is, of course, impossible, illustrating the need for, and efficacy of, the Contract Clause.

insurance companies. It follows *a fortiori* that Alabama has no legitimate interest in imposing this exorbitant punitive damage award retrospectively on a party for breach of a contract which was executed and performed years earlier. Indeed, it is difficult to imagine a case in which the retrospective application of a new obligation on a contractual relationship would better fit this Court's language in *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60 (1935), that an impairment of contract might be "without moderation or reason or in a spirit of oppression."

V

THE $3,500,000 PUNITIVE DAMAGE AWARD VIOLATES APPELLANT'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

If appellees ultimately prevail in this case, they will receive a windfall which exceeds their actual damages by an amount which would reimburse those damages two thousand times over. They will receive this massive bounty not because the legislature of Alabama has determined that such rewards serve some legitimate state purpose. In fact, the Alabama legislature determined in 1981 that a wronged claimant should receive "one and one-half percent per month on the amount of said claim until it is finally settled or adjudicated." § 27-1-17(b), *Code of Alabama* (1975) (App. 2a, *infra*). This would mean approximately $2,400 if calculated from June 3, 1977, the date the Lavoie claim was first declined, to the present. The Alabama courts have added another $3,497,600.

This punitive damage award cannot be reconciled with the concepts of fairness, rationality and proportionality that have been imposed on the States under either the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment.

A. The Excessive Fines Clause of the Eighth Amendment Should Be Held To Apply to Punitive Damage Awards in Civil Cases

The Eighth Amendment expressly prohibits excessive fines. Remarkably, this Court has never had occasion to construe that provision. Under traditional analysis, therefore, the determination whether the Excessive Fines Clause applies to control the punitive damage award in this case requires an examination of the origins of the Eighth Amendment and the contemporary construction of the Cruel and Unusual Punishments Clause component of that Amendment by this Court.

However, before commencing that examination it is important to recognize an important aspect of the punitive damage award here which is beyond dispute and which frames the Excessive Fines Clause inquiry.

The purpose of the imposition of this $3,500,000 award against appellant was articulated by the court below in terms that could not have more succinctly expressed the classic purposes of criminal punishment:

> "The purpose behind the imposition of punitive damages is twofold: (1) to punish the defendant for his oppressive, willful acts *and* (2) to warn or deter others . . . from equally reprehensible conduct."

(J.S. App. 34a).[14] This characterization below of the purposes of this punitive damage award pretermits the need for the kind of searching inquiry into the intent behind the authorization for a particular fine or punishment that has normally accompanied this Court's decisions applying constitutional provisions such as the Bill of Attainder Clause to cases involving neither a criminal trial as such nor incarceration.[15]

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[14] "If the statute imposes a disability for the purposes of punishment — that is, to reprimand the wrongdoer, to deter others, etc. — it has been considered penal." *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (Warren, C.J.) (plurality opinion).

[15] *E.g.*, *United States* v. *Lovett*, 328 U.S. 303 (1946).

Furthermore, there is no disagreement in this Court with the proposition that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J., dissenting). If the imposition of a large fine in order to punish and deter others is not sufficiently analogous to a criminal punishment for the Eighth Amendment to apply, serious doubt would be cast on the continuing vitality of cases such as *Trop* v. *Dulles*, 356 U.S. 86 (1958), and *In re Gault*, 387 U.S. 1 (1967), which have been cited by this Court as examples of punishment administered in non-criminal proceedings to which the Eighth Amendment is applicable. *Ingraham* v. *Wright*, 430 U.S., at 669 n.37 & 671-72 n.40.

1. *The relevant history of the Excessive Fines Clause and its English antecedents requires the application of that Clause to punitive damage awards in civil actions*

This Court has only recently reexamined the history of the Eighth Amendment and reaffirmed the pertinence of the English experience to questions arising under that Amendment, *Solem* v. *Helm*, 463 U.S. 277, 284-86 (1983); *Ingraham* v. *Wright*, 430 U.S., at 664-66. Appellant will therefore restrict its commentary on the background of that Amendment to the question whether the Excessive Fines Clause was intended by its Framers to apply only to a fine or penalty imposed in a criminal proceeding.

This Court has, of course, clearly understood and applied the Cruel and Unusual Punishments Clause — which is more obviously associated with punishments imposed after criminal proceedings than is the Excessive Fines Clause — to reach certain types of punishment which have not been imposed in criminal proceedings. *E.g.*, *Trop* v. *Dulles*, *supra*. The same rationale should apply, for even more persuasive reasons, to the Excessive Fines Clause.

It is noteworthy that the brief debate on the Excessive Fines Clause in the First Congress, 1 Annals of Cong. 782-83 (Gales & Seaton eds. 1834), immediately followed the debate in the House over the proposed Fifth Amendment. *Id.*, at 781-82. Because the Fifth Amendment contained clauses that could have been thought to apply outside the context of criminal proceedings, such as the Self-incrimination Clause, Representative Lawrence proposed, and the House adopted, language to confine that Clause "to criminal cases." *Id.*, at 782. If the Framers of the Eighth Amendment had intended that its Clauses not be applied outside the context of criminal proceedings, a similar amendment presumably would have been proposed. Thus, absent a persuasive reason to believe that the Framers believed the word "fines" to encompass only monetary penalties assessed in criminal proceedings, and there is none, the presumption is against such a narrow reading of the word "fines."

An analysis of the English experience, similar to that undertaken in *Solem* and *Wright*, is also relevant to the application of the Excessive Fines Clause to punitive damage awards in a fashion not drawn out, for obvious reasons, in *Solem* and *Wright*. This experience convincingly demonstrates that the sources of our Eighth Amendment — Magna Carta and the English Bill of Rights — would have applied the principles embodied in the Excessive Fines Clause directly to control punitive damage awards.

Punitive damages under English common (and statutory) law originated in the same type of civil actions which were covered by the "excessive amercement" provision of Magna Carta.[16] Pollock and Maitland, in their general discussion of offenses punishable by amercement or imprisonment in 13th-century England, set out the origins of "penal and exemplary damages" as follows:

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[16]Ch. 20 of Magna Carta declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." *See* 1 S.D. Codified Laws 4 (1978) (translation of Magna Carta), *as quoted in Solem* v. *Helm*, 463 U.S., at 284 n.9.

> "[U]nder Edward I, a favourite device of our legislators is that of giving double or treble damages to 'the party grieved.' They have little faith in 'communal accusation' or in any procedure that expects either royal officials or people in general to be active in bringing malefactors to justice. More was to be hoped for the man who had suffered . . . . And so in a characteristically English fashion punishment was to be inflicted in the course of civil actions: it took the form of manyfold reparation, of penal and exemplary damages."

2 F. Pollock & F. Maitland, *The History of English Law* 522 (2d ed. 1909). This observation by Pollock and Maitland, directly tying the English concept of "punishment" to the award of "penal and exemplary damages," is placed in its broader context earlier in that same discussion as follows:

> "*Offences punished in the course of civil actions.* Every tort, nay, every cause of civil action, was a punishable offence. Every vanquished defendant, even though the action was 'real' or was contractual, had earned punishment. At the least he had been guilty of an unjust detention . . . . In the lower courts he could only be — but he would be — amerced."

Id., at 519.

As this Court many centuries later observed, "An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th-century England. *See* 2 F. Pollock & F. Maitland, The *History of English Law* 513-515 (2d ed. 1909)." *Solem* v. *Helm*, 463 U.S., at 284 n.8. There can be no doubt that the double or treble damages awarded as punitive damages were regarded as an amercement under the earliest relevant English law and were therefore presumptively controlled by the "excessive amercement" provision of Magna Carta. As this Court observed in *Solem* v. *Helm*, "These were not hollow guarantees, for the royal courts relied

on them to invalidate disproportionate punishments." 463 U.S., at 285.[17]

In 1689, the English Bill of Rights incorporated the "excessive amercement" principle of Magna Carta and applied that principle to "excessive Baile . . . excessive Fines [and] cruell and unusuall Punishments." 1 Wm. & Mary, Sess. 2, Ch. 2 (1689). That provision was, in turn, incorporated into Art. I, § 9 of the Virginia Declaration of Rights (1776), and thence into the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10. The result of this chain of events dating back to the earliest punitive damage awards and to Magna Carta is clear:

> "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection — including the right to be free from excessive punishments."

Id., at 286. Thus, the punitive damage award in this case is of the same character as the remedies which were intended to be limited by the linear antecedents of the Eighth Amendment.

Finally, although punitive damages as awarded in this case are a relatively recent development in American jurisprudence, there is very little doubt that Blackstone would have regarded such damages as falling within the English common law definition of "fine." In Volume 3 of his *Commentaries*, dealing with "Private Wrongs," Blackstone identifies no less than six instances in which civil actions for damages were maintained by private persons where, if the plaintiff prevailed, the defendant was required to pay a fine to the Crown. 3 W. Blackstone, *Commentaries on the Law of England* *118,

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[17]The case relied upon by the Court to support this proposition, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), upheld the claim of Richard Le Gras that an amercement of one mark against him for his improper essoin in a civil case was excessive and therefore in violation of Magna Carta.

*138, *179, *188, *398, *402 (1768). Here, of course, the punitive damage award is made to the appellees, not the State of Alabama. But, as Justice Rehnquist observed in *Smith* v. *Wade*, the purposes of punitive damages are not to right any wrong done to the plaintiff; indeed, Justice Rehnquist noted that, in theory, punitive damages should be paid to the State, not the plaintiff. 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). *See also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (punitive damages "are private *fines* levied by civil juries" (emphasis added)).

2. *The $3,500,000 punitive damage award in this case is excessive*

In *Solem* v. *Helm*, this Court was presented with two substantial difficulties in applying the Eighth Amendment which are not present here. First, four Justices squarely rejected the holding that the Cruel and Unusual Punishments Clause incorporated the concept of proportionality as held by the majority. *See Solem* v. *Helm*, 463 U.S., at 312-15 (Burger, C.J., dissenting). If, however, the Excessive Fines Clause is applicable to the punitive damage award in this case, then it seems indisputable that the appropriate inquiry regarding excessiveness must be an inquiry into proportionality.

Second, an inquiry into proportionality in the context of punitive damages awarded under a judicially created cause of action, as here, does not involve an intrusion by this Court into that delicate balance of federalism which moved the dissenters in *Solem* to observe that the proportionality review there was "nothing other than a bald substitution of individual subjective moral values for those of the legislature." *Id.*, at 314. Indeed, the excessiveness of the award here is dramatized by the staggering difference between it and the amount determined to be appropriate under the formula adopted by the Alabama legislature in 1981 in § 27-1-17.

Determining whether the award in this case is disproportionate and therefore excessive is not complicated. Appellant was found by a jury wrongfully to have refused to pay a claim of $1,650.22. The only available measure of propor-

tionality is to compare those contract damages with the $3,500,000 punitive damage award. The ratio is about the same as four hours bears to one year. A bar graph showing the punitive damage award as the height of this page would have a small, virtually invisible speck (seven one-hundredths of one sixteenth of an inch) on the bottom of the page to represent the actual damages.

Other legislative value judgments made by the Alabama legislature demonstrate the grossly disproportionate relationship between the contract damages in this case and the $3,500,000 punishment inflicted on appellant. If appellant's conduct in this case had been punishable as a business fraud under Alabama's *criminal* statutes on that general subject, appellant not only would have been entitled to the full panoply of federal constitutional protections available to those exposed to criminal punishment in criminal proceedings—protections not extended to appellant—but, if found guilty, could have anticipated a monetary penalty of $3,000. *See* §§ 13A-4-3, 13A-5-12 and 13A-9-41 *et seq.*, *Code of Alabama* (1975).[18]

Comparisons between the punishment in the case at bar with other statutory schemes yield essentially the same result. For example, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, a private plaintiff is authorized to bring a civil action, § 1964, under which treble damages (plus attorneys' fees) may be recovered if the defendant can be shown, *inter alia*, to have engaged in "racketeering" activity. § 1961(1). As four Justices of this Court expressly observed only last Term, RICO places defendants in the position of "facing a tremendous financial exposure [producing] a strong interest in settling the dispute." *Sedima, S.P.R.L.* v. *Imrex Co.*, Nos. 84-648 & 84-822, slip op., at 4-5, 53 U.S.L.W. 5034, 5041 (July 1, 1985) (Marshall, J., dissenting). Yet this "tremendous financial exposure" pales by comparison to the

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[18]It is noteworthy that the penalties under either Alabama's business fraud provisions or under § 27-1-17 would be roughly the same as the double-to-treble "exemplary" damages originally awarded in English cases based upon legislative initiative. *See* 2 F. Pollock & F. Maitland, *The History of English Law* 522 (2d ed. 1909).

exposure to which appellant and other insurers are subjected on a daily basis in Alabama. If appellant had violated RICO and caused the same amount of damages as in this case, its penalty would have been 700 times smaller under the remedy adopted by Congress than the remedy created and approved in this case by the Supreme Court of Alabama.

Appellant has demonstrated that the Excessive Fines Clause was intended to and does apply to punitive damages imposed in civil litigation. The excessiveness of the fine in this case is surely incontestible.

B. The $3,500,000 Punitive Damage Award Violates Appellant's Rights Under the Due Process Clause

Punitive damages, by definition, transfer from one litigant to another a monetary recovery "in excess of . . . actual loss." *Scott* v. *Donald*, 165 U.S. 58, 86 (1897). Under the Due Process Clause, property rights may be affected, or a person punished, only after Due Process has been observed. *Ingraham* v. *Wright*, 430 U.S., at 672. Appellant submits that the imposition of punitive damages in this case violates the Due Process Clause because it confiscates a large amount of appellant's property and transforms it into an extraordinary monetary windfall to appellees. The occasion for doing so is punishment for acting inconsistently with a substantive rule of conduct that was nonexistent in Alabama when the acts of which appellees complained took place.

Punitive damages are, almost by definition, arbitrary, capricious, severe and whimsical. It is therefore not surprising that various members of this Court have expressed significant concern regarding their place in a culture which places a high premium on due process of law. For example, in *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979), Justice Marshall, writing for himself and Justices Brennan, Stewart, White and Powell, pointed out that, "Because juries are accorded broad discretion as to the imposition and amount of punitive damages, . . . the impact of these windfall recoveries is unpredictable and potentially substantial." And Justice Marshall went on to state another danger of punitive damages — that

they "may be employed to punish unpopular defendants." *Id*, at 50-51 n.14.[19]

In *Smith* v. *Wade*, Justice Rehnquist, writing for himself, the Chief Justice and Justice Powell, pointed out that punitive damages are generally rationalized on three grounds. First, they "'are assessed for the avowed purpose of visiting a *punishment* upon the defendant.'" 461 U.S., at 58, *quoting* C. McCormick, *Law of Damages* 275 (1935) (emphasis added by Rehnquist, J.), but such a punitive fine — if it should be imposed in a *civil* trial at all — "should go to the State, not to the plaintiff — who by hypothesis is fully compensated." *Id.*, at 59.

Second, Justice Rehnquist observed that punitive damages are justified as deterring "persons from violating the rights of others." *Id.*, at 58. Where a known rule of conduct is violated, as was the situation in *Smith* v. *Wade* itself, the "deterrence" rationale perhaps would provide some arguably rational basis for a State's authorizing the recovery of a reasonable amount of punitive damages by a private person. But where, as here, no cause of action for bad faith failure to pay an insurance claim existed until almost fourteen years after execution and four years after performance under the contract — much less a set of rules accompanying that cause of action to which appellant might have looked for guidance — it is plainly irrational to suggest that the retrospective application of new rules to historic conduct could have any deterrent effect.

Finally, Justice Rehnquist observed that punitive damages had been "justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights." *Id.* It is, however, inconceivable that Alabama's interest in encouraging bounty hunters to sue those with whom they have contracted bears any rational relationship to the $3,500,000 award in this case.

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[19]Justice Marshall's statement in this regard made reference to hostility of jurors towards unions or management. As illustrated by the attitude of Justice Embry discussed *supra*, hostility of this nature is not limited to jurors or to unions and management.

As Justice Brennan, writing in dissent and joined by Justices Marshall, Blackmun and Stevens only last Term indicated, the Court's cases have "recognize[d] that 'the alleged deterrence achieved by the punitive damage awards is likely to be outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined.'" *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-13, slip op., at 6 n.4, 53 U.S.L.W. 4866, 4874 n.4 (June 26, 1985) (Brennan, J., dissenting), *quoting Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting).[20]

Appellant submits that the Due Process Clause prohibits the imposition of *any* punitive damages in the context of the performance of contractual obligations in the absence of any fair warning that such damages might be imposed, in the absence of any articulated substantive rule of conduct which, by following, a party to a contract can avoid such liability, and in the absence of any state interest sufficient to outweigh the irrational impact on businesses such as the insurance business which, as argued above and as previously observed by this Court, depend greatly upon stability in their contractual relationships. And, as this Court has made abundantly clear, the restrospective application of such liability has "to meet a burden not faced by [measures] that ha[ve] only future effects." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, ____ U.S. ____, ____, 104 S.Ct. 2709, 2718 (1984). Here, the retro-

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[20]The court below has apparently abandoned any pretense of controlling the size of punitive damage awards. *See American Pioneer Life Ins. Co.* v. *Sandlin*, No. 82-1603, slip op., at 21 (Ala. Apr. 12, 1985) (Maddox, J., concurring specially).

spective imposition of this new tort and its accompanying liability for punitive damages is both "harsh and oppressive," *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981), and is therefore violative of the Due Process Clause because it advances no legitimate state interest. Instead, it is focused, well after the fact, on the "blameworthiness" of appellant, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976), and on achieving some kind of "deterrence," *id.*, at 17 — precisely the two objectives identified by this Court as least likely to sustain the retrospective imposition of civil liability. *Id.*

These fundamental defects in the process afforded to appellant in this case must also be considered in the context of the fact that this punitive damage award was imposed in a civil action "unaccompanied by the types of safeguards present in criminal proceedings." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting). At the very least, this absence of safeguards strongly supports this Court's applying the Excessive Fines Clause, or the Due Process Clause *ex proprio vigore*, to control the imposition of punitive damage awards. Failure of this Court to do so would, appellant submits, be contrary to the thrust of this Court's cases which have already placed limits on the power of the government to impose punishment on persons in civil litigation. *See, e.g., United States* v. *Ward*, 448 U.S. 242, 248-51 (1980) *and cases cited.* These limitations, particularly as they would affect the size of punitive damage awards, would preserve the constitutional rights of litigants while at the same time permitting the States appropriate leeway to ensure adequate compensation for wrongs committed within their respective jurisdictions. *Cf. Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18, slip op., at 7, 53 U.S.L.W., at 4872 (White, J., concurring in the judgment).

CONCLUSION

The Aetna Life Insurance Company's experience with the laws and the courts of Alabama reflects a drastic departure from constitutional standards. For conduct which violated no law, it has been punished in an amount vastly in excess of any penalty which would have been imposed under any penal code analog. The process by which that penalty was inflicted was devoid of the protections the Constitution requires as minimal standards for those accused of crime but exposed to less oppressive punishments. Its carefully negotiated contractual expectations have been uprooted. It has been penalized arbitrarily for resorting to the Alabama appeal process. It has been denied a fair hearing in a fair tribunal.

The judgment below should be set aside and the matter remanded to the Alabama courts for the entry of a judgment not in excess of the compensatory damages awarded by the jury in this case.

Respectfully submitted,

*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Of Counsel:

PETER V. SINTZ
WILLIAM M. CUNNINGHAM, JR.
SINTZ, PIKE, CAMPBELL & DUKE
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

Attorneys for Appellant
**Counsel of Record*

August 2, 1985

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Contract Clause, Art I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

3. The Excessive Fines Clause of the Eighth Amendment of the Constitution, provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

4. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

5. Section 12-22-72, *Code of Alabama* (1975), provides in pertinent part, that:

> "When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . ."

6. Section 27-1-17, *Code of Alabama* (1975), provides:

> "Limitation period for payment of claims under health and accident insurance policies; payment of interest; right of action for recovery of unpaid benefits.

"(a) All persons, firms, corporations or associations issuing health and accident insurance policies within this state shall consider claims made thereunder and, if found to be valid and proper, shall pay such claims within 45 days after the receipt of proof of loss under such policies. Benefits due under the policies and claims are to be considered overdue if not paid within 45 days after the insurer receives reasonable proof of the fact and amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof shall be considered overdue if not paid within 45 days after such proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof shall be considered overdue if not paid within 45 days after such proof is received by the insurer. For the purposes of calculating the extent to which any benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail to the last known address of the claimant or beneficiary in a properly addressed, postpaid, envelope, or, if not so posted, on the date of delivery.

"(b) If the claim is not denied for valid and proper reasons by the end of said 45 day period, the insurer must pay the insured one and one-half percent per month on the amount of said claim until it is finally settled or adjudicated.

"(c) In the event that the insurer fails to pay such benefits when due, the person entitled to such benefits may bring an action to recover them."

CASE ACTION SUMMARY
—CIVIL—

State of Alabama
Unified Judicial System

IN THE CHANCERY COURT
OF JEFFERSON COUNTY

Case Number CV 84 500-447 JDC

Amount 57.00

Date Filed 1/30/84

T. ERIC EMBRY,

Plaintiff(s),

V.

BLUE CROSS/BLUE SHIELD OF ALABAMA,

Defendant(s).

DATE	ACTIONS, JUDGMENTS, CASE NOTES
1-30-84	Comp. Seeking Declaratory Judgment
1-31-84	Sum. & Comp. iss'd.
2-2-84	Ex (2/3)
3-2-84	Mot. to Dismiss & Notice (SBA) (3/5)
4-11-84	Order of Continuance (Joe) (4/16)
5-31-84	Order (JDC) (6/7)
10-2-84	Notice of Depo. (SBA) (10/3)
11-14-84	Motion to Compel & Notice (SBA) (11/15)
11-19-84	Order (JDC) (11/26)
11-21-84	P's Mot. to Certify this Action as a class action (SBA) (11/26)
11-21-84	Notice of Hearing (11/26)

12-7-84	D's Answer to P's Interr. (SBA) (12/10)
12-12-84	Response to P's Request for Production (SBA) (12/13)
12-13-84	Motion to Compel (SBA) (12/14)
12-13-84	Motion of Hearing (12/14)
12-17-84	Notice of Depo (SBA) (12/18)
12-19-84	Depo of E. Gene Thrasher (12/20)
12-20-84	Order on Motion to Compel (JDC) (12/26)
12-21-84	Memorandum of Plaintiff (SBA) (12/26)
1-4-85	P's Motion for a Protective Order & Notice (SBA) (1/7)
1-7-85	D's Supplemental Answers to P's Interr. (SBA) (1/10)
1-7-85	Motion for Protective Order & Notice (SBA) (1/10)
1-9-85	Order (JDC) (1/10)
1-9-85	Order Re: Class Certification Hearing (JDC) (1/10)
1-14-85	Order of Continuance (JDC) (1/16)
3-20-85	Depo of T. Eric Embry (3/27)
4-9-85	Notice of Depo (SBA) (4/10)
4-16-85	Stipulation for Dismissal (4/18)
4-16-85	Order of Dismissal (JDC) (4/18)

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QUESTIONS PRESENTED

1. Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing or afterwards, contrary to established state practice, and which were not passed upon by that court, are within this Court's jurisdiction.

2. Whether a long-established Alabama statute, which discourages frivolous and dilatory appeals by increasing the amount of money damages awarded in civil cases if the judgment is affirmed on appeal, is an irrational enactment in violation of the Equal Protection Clause.

3. Whether the Due Process Clause required one justice of the nine-member Supreme Court of Alabama to disqualify himself because he was the plaintiff in a case involving a similar cause of action but against a different insurance company in a different factual setting, when that case would not have been materially affected by the decision below, the case was instituted solely for the purpose of reforming the other insurance company's claim practices, the justice did not expect to and did not in fact receive a money judgment, and the case was settled with an accompanying stipulation wherein the other insurance company conceded that its claim practices generally were deficient and should be reformed.

4. Whether the Contract Clause applies to restrict decisions of state courts contrary to the explicit language of the clause, the expectations of the framers, and the consistent decisions of this Court.

5. Whether this Court should reverse two centuries of settled practice and law by applying the Eighth Amendment to civil proceedings, and whether a punitive damage award against Appellant for its egregious and intentional misconduct in denying Appellees' lawful insurance claim on four separate occasions, and then attempting to cover up this misconduct through dishonest means during sub-

sequent litigation, is excessive when the award compensates Appellees for the injuries caused by Appellant's tortious conduct, deters insurance companies from engaging in misconduct in the future, and provides insureds with an incentive to contest intentional misconduct which could otherwise go unremedied.

6. Whether the Due Process Clause prevents a state from recognizing a cause of action in tort, pursuant to the traditional common law method, for intentional misconduct by insurance companies in violation of their long-established legal duty of good faith and fair dealing towards their insureds.

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BRIEF OF APPELLEES

JURISDICTION

Appellant invokes this Court's jurisdiction under 28 U.S.C. § 1257(2). Appellant did not raise its constitutional challenge to Ala. Code § 12-22-72 within the time limits permitted under Alabama procedure, and it was not ruled upon by the Supreme Court of Alabama. Similarly, Appellant's other federal claims were neither timely presented nor considered by the court below. In the absence of either timely presentation or consideration of the federal issues, this Court lacks jurisdiction.

COUNTERSTATEMENT OF THE CASE

The cynosure of this case is the gross misconduct by Appellant Aetna Life Insurance Co. and its employees which caused a civil jury to assess $3.5 million in punitive damages, and persuaded both the trial court and the Supreme Court of Alabama to uphold the verdict. As fully revealed in the Alabama court's detailed findings of fact, J.S. App. 1a-40a,[1] which must be regarded as conclusive upon appeal, numerous Aetna personnel knowingly assembled a mosaic of deceptions, evasions and outright lies during the course of Appellant's four separate decisions to deny Appellees' insurance claim and then to contest this claim, which they knew had been unlawfully denied each time, in state court. Moreover, these personnel acted repeatedly and knowingly in violation of Appellant's own internal procedures: they did not secure review by Appellant's medical staff prior to acting upon the claim; they failed to obtain essential medical documents; and they ignored evidence demonstrating the validity of the claim. All of this occurred at a time of serious financial distress for Appellees.

Appellees Margaret and Roger Lavoie are husband and wife. Mrs. Lavoie was retired at the time of her hos-

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[1] "J.S. App. ——" refers to the appendix to Appellant's jurisdictional statement. "J.A. ——" refers to the Joint Appendix.

pitalization, and Mr. Lavoie was a former police officer who had retired on disability from a brain tumor. They were insured under a group hospitalization policy sold by Appellant to the City of Mobile. Mrs. Lavoie was admitted to the Mobile Infirmary Hospital on February 3, 1977 on the recommendation of her personal physician, Dr. John B. Douglas. Mrs. Lavoie, who had a known history of chronic ulcerative colitis, had been experiencing lower back pain, osteoarthritis, and bright red bleeding from the bowel area. Dr. Douglas also observed that Mrs. Lavoie exhibited unusual personality changes and appeared to have flight of ideation.

Mrs. Lavoie remained in the hospital for 23 days, during which time Dr. Douglas or his partner ordered diagnostic tests for Mrs. Lavoie, including an electroencephelogram (EEG), an electrocardiogram (EKG), a gastrointestinal series (GI series), a barium enema, and a computer assisted tomogram (CAT scan). The total bill for Mrs. Lavoie's treatment, hospitalization and tests amounted to $3,028.25, of which Appellant paid only $1,378.03. The remaining amount of $1,650.22—representing the charges for Mrs. Lavoie's diagnostic tests and room and board at the hospital—was subject to four administrative reviews by Appellant, each resulting in denial of payment on the purported grounds that Mrs. Lavoie could have been treated on an out-patient basis and that these tests were not "usual and customary procedures" for a patient with Mrs. Lavoie's symptoms. The record reveals, and Appellant knew, that Dr. Douglas believed these tests and Mrs. Lavoie's hospitalization were medically necessary to determine whether Mrs. Lavoie suffered from abdominal and/or intracranial disease in light of her symptoms.

It is no longer at issue in this case that the refusal to pay the Appellees' claim was unlawful. Appellant had no sound basis for each denial, and its attempt at trial to fashion a *post hoc* justification for its action was properly rejected by the jury. Similarly, Appellant can-

not now dispute the findings of the Alabama courts of its outrageous misconduct while processing and subsequently litigating Appellees' claim which justified a punitive damage award of $3.5 million for the intentional tort of bad faith failure to pay a legally owed insurance claim.

As the Supreme Court of Alabama found, Appellant provided as a matter of basic internal procedure that its personnel must solicit the opinion of its medical staff prior to acting upon disputes involving medical judgment. Yet Appellant knowingly violated this rule by denying Appellees' claim on three successive reviews without first consulting with its medical staff. Compounding this misconduct, Appellant on two occasions knowingly misrepresented to the Lavoies that the denial was based upon prior consultation with the medical staff.

Appellant subsequently attempted to cover up these knowing misrepresentations, and was exposed for doing so at trial. In an affidavit submitted in an effort to have summary judgment entered against the Lavoies, the responsible employee in Appellant's Mobile office, Brenda Harris, attempted to rationalize the two incorrect statements by claiming that she regarded her prior consultation with claims examiners in the Home Office in Hartford, Connecticut as generally involving Appellant's medical staff. At trial, however, Harris admitted under oath that she knew these examiners were not medical personnel or part of Appellant's medical staff. Appellant's knowing efforts to distort facts to avoid any liability thus extended beyond its insureds to the Alabama courts —a fact which was known to the jury.

Appellant also failed to observe its internal rules requiring all decisions on medical claims to be based upon a complete medical dossier. Appellant failed to obtain Mrs. Lavoie's hospital progress notes and records, which its personnel conceded were highly probative documents, at any time during the four reviews. Indeed, the nurses' notes, admittedly an integral part of Mrs. Lavoie's medi-

cal records, were obtained only in April, 1978, after the third denial.

Moreover, when Appellant belatedly did submit the claim to its own medical staff, the two most important medical documents—letters from Dr. Douglas explaining the medical necessity for Mrs. Lavoie's hospitalization and diagnostic tests—were omitted from the file. In an effort to cover up this mishandling, the member of the medical staff involved, Dr. Swan, testified at trial that he had nevertheless reviewed "the letter" from Dr. Douglas and concluded that it did not justify the hospitalization or tests ordered for Mrs. Lavoie. In fact, the Supreme Court of Alabama found that Dr. Swan's earlier affidavit plainly revealed that he had never once reviewed either or both of Dr. Douglas' letters, which Doctor Swan admitted were the "most important" data in the file. J.S. App. 19a.

A further misrepresentation to the court was revealed in the testimony of Thomas Hutton, a Home Office claims examiner. In a pre-trial deposition, Hutton claimed that he had reviewed the Lavoie file sometime in 1978, discussed the file with Doctor Swan, reviewed the nurses' notes, and submitted Doctor Douglas' letters to Doctor Swan. At trial, however, Hutton admitted that he in fact had never reviewed the Lavoie file after December 20, 1977, thereby demonstrating that the 1978 activities he testified to under oath were mere fabrications.

Appellant's personnel also engaged in plainly disingenuous behavior by soliciting material from the hospital which they had no intention of considering. On March 24, 1977, Brenda Harris requested certain documents from the hospital relevant to the Lavoies' claim. Less than two weeks later and before receiving any response to her letter, Harris forwarded the incomplete file to the Home Office along with her recommendation to deny payment of the claim. After receiving the Home Office's concurrence, Harris then notified the Lavoies for the first time on June 3, 1977 that Appellant would not pay the claim,

still without having received the documents requested from the hospital.

Relatedly, Appellant's personnel at no time gave serious consideration to Dr. Douglas' medical opinion which they had solicited. In response to the denial of June 3, 1977 and Appellant's earlier inquiries, Dr. Douglas drafted the first of two letters detailing the medical necessity of Mrs. Lavoie's hospitalization and tests in light of her symptoms. In a letter to the Lavoies dated November 14, 1977, Harris, without consulting Appellant's medical staff, found Dr. Douglas' explanation inadequate and invited the Lavoies to supply "further information" from Dr. Douglas. Dr. Douglas then drafted his second letter restating the need for hospitalization and tests for Mrs. Lavoie. In a letter dated December 3, 1977 and containing the knowing misrepresentation that she had checked with the medical staff, Harris again rejected Dr. Douglas' opinion as inadequate. Harris' glib reiteration in this letter that Appellant "would be most happy to consider" any further information from the Lavoies was both misleading and dishonest in light of Appellant's failure to accord serious consideration to Dr. Douglas' letters and Harris' knowing misrepresentation to the Lavoies regarding the type of consideration in fact given.

Further, Appellant's gross mistreatment of Appellees stemmed in part from its perception that they probably would not pursue their claim in court. In response to Dr. Douglas' first letter, Thomas Hutton advised Brenda Harris to maintain the position denying the Lavoies' claim unless "they act like they are going to file suit," J.S. App. 7a, in which case Hutton wanted the file sent back to him for reconsideration. This remark graphically demonstrates what the Alabama courts found to be characteristic of Appellant's claims procedure—a policy not of fairly paying legitimate claims, but instead of pressuring insureds in a position of weakness to accept less than their due.

Faced with this "overwhelming" evidence of bad faith, J.S. App. 12a, it took the jury only 50 minutes to reach a decision awarding Appellees punitive damages for Appellant's tortious conduct. The trial court which heard the testimony denied Appellant's motion for a j.n.o.v. or, alternatively, for remittitur. The Supreme Court of Alabama held that "the record is replete with evidence that at no time did Aetna review the claim in good faith, consider all the facts available to it and comply with its own established rules and procedures." J.S. App. 13a. The court further concluded on the basis of this record that "the dark shadows of fraud and conspiracy enveloped each and every aspect of Aetna's actions regarding the handling of the Lavoie claim from the instance of the first denial and continued throughout the trial itself." J.S. App. 35a. It stated that "[t]here is a plethora of . . . places in the record of testimony and exhibits from which the only conclusion a reasonable person could draw is that Aetna, through its employees, was guilty of fraud, bad faith, and unfair dealing, had a dishonest purpose, and was motivated by self interest and ill will." J.S. App. 22a.

SUMMARY OF ARGUMENT

I.

This Court lacks jurisdiction over this case because no federal issue was either timely presented to or passed upon by the Alabama courts. Not only were no federal issues presented during the trial and three appeals of this case, there was no mention of any such issues in Appellant's application for rehearing as well. The first presentation of any federal issue was in a later brief in support of rehearing. Other issues were not even raised then, but appeared later in a series of unauthorized pleadings.

This Court and the Supreme Court of Alabama have held that it is improper to raise issues at the rehearing stage and that this Court cannot consider these improp-

erly made arguments. Further, there was no "surprise" to Appellant in the decision below which Appellant claims for the first time occasioned the arguments it seeks to present.

II.

Ala. Code § 12-22-72 represents a rational exercise of the judgment of the Alabama legislature. The purpose of the statute is to deter dilatory and unmeritorious appeals and to provide additional damages to those whose collection of a judgment is delayed, both legitimate state objectives. The Alabama legislature rationally concluded that the danger of dilatory appeals was greatest with those who owed money judgments. Numerous other state and federal statutes rely on similar distinctions and have been routinely upheld under the Equal Protection Clause.

III.

The participation of Justice Embry in the deliberations of the nine-member Alabama court satisfied constitutional standards. The litigation in which he was involved was settled with a stipulation that the purpose of the suit was not to obtain a monetary award. Further, the decision below did not change Alabama law at all, a point not disputed by the dissenting justices. Justice Embry thus had no prohibited direct interest in the outcome of the case.

Nor was Justice Embry disqualified for bias. There is no evidence of any bias in his participation in the Alabama court's proceedings. His deposition, relied on by Appellant, reveals no fixed disposition against insurance companies in general, much less a personal bias against Appellant. The views of an appellate judge on the law are not matters going to the judge's qualifications.

IV.

The Contract Clause of the Constitution, contrary to Appellant, does not apply to decisions of state courts. This Court, in a long line of decisions, has held that the

clause applies only to actions of state legislatures. The history of the clause's adoption, as well as the use of the operative word "pass," confirm that judicial decisions are not within the scope of the restriction.

V.

The Eighth Amendment does not apply to this proceeding. It is limited to criminal penalties, while the Alabama courts here imposed civil damages. Appellant identifies no constitutionally required procedures it was denied. Punitive damages have long been recognized as a civil penalty and their imposition by both state and federal courts in numerous settings has been routinely upheld. The award in this case was not excessive in view of Appellant's egregious misconduct, its financial resources, the differences in position between Appellant and its insureds of which Appellant sought to take advantage, and in light of the deterrent purpose of awarding punitive damages.

VI.

The punitive damages award did not violate the Due Process Clause. Contrary to Appellant, the standards for awarding such damages and the protections against excessive judgments are well established. Further, the duty of Appellant towards its insureds which the Alabama courts found had been violated is one of long standing. The development of the tort of bad faith denial of claims began long before Appellant's conduct which led to the decision on review. Appellant thus knew it had a duty to its insureds and points to no reasonable cause for any expectation on its part that it could flagrantly violate its own procedures to the detriment of its insureds and suffer no loss. The course Appellant urges—substantive review of a state tort damages award—is unduly intrusive on a matter wholly of state law and would make this Court the arbiter of every substantial damages award.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS CASE

This appeal should be dismissed. None of the federal questions which Appellant argues were timely presented to, or actually ruled upon by, any Alabama court. In construing Section 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, Justice Story wrote: "it has been uniformly held that to give this court jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the same court . . . ." *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 390 (1836);[2] *see Illinois v. Gates*, 462 U.S. 213 (1983); 16 C. Wright, A. Miller, E. Cooper & E. Gressmen, *Federal Practice and Procedure* § 4022 (1977). Appellant's burden is to show that the issues it brings to this Court were timely and properly presented in the Alabama courts. *See Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651 (1942). The earliest any of the federal issues now presented was raised before the Alabama courts was in Appellant's brief in support of its application for rehearing below. Since the Alabama court was under no obligation to rule on new issues raised then or later, and did not do so, this Court lacks jurisdiction and the case should be dismissed.

A. The Affirmance Statute

Appellant's constitutional attack on Ala. Code § 12-22-72 was first made in its brief in support of its application for rehearing before the Supreme Court of

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[2] Appellant's reliance on *Crowell* (Br. at 11) is misplaced. The language quoted by Appellant was from the Court's conclusion and did not, even in *dicta*, deal with the question of whether the Court has jurisdiction over issues not properly presented or considered. The conclusion pressed by Appellant is directly contrary to the holding of *Dewey v. City of Des Moines*, 173 U.S. 193 (1899).

Alabama, which Appellant had received permission to file one week after the underlying application. J.S. App. 79a. No mention of this issue was made in the application. Recognizing that this was improper,[3] Appellant filed an amendment to its application to add a general constitutional issue. J.A. 51. Ala. R. App. P. 40, however, does not provide for any extension of the 14-day period for filing applications for rehearing. And while extensions of that period by motion for good cause are not barred by Ala. R. App. P. 26(b), Appellant neither filed such a motion nor indicated any grounds for an extension. Thus, Appellant did not comply with Alabama procedure.[4]

In any event, the Alabama courts do not permit new questions to be presented on rehearing.[5] In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), this Court acknowledged that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." And "[q]uestions first pre-

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[3] In this situation, the Supreme Court of Louisiana held that an extension of time for the brief on rehearing "does not give [counsel] the right to raise issues therein that had not heretofore been made in his application for rehearing." Gautreaux v. Harang, 190 La. 1060, 183 So. 349, 374 (1938); *see* Lomenick v. Hartford Accident & Indem. Co., 189 So. 2d 731 (La. App. 1966). Appellant (Br. at 12 n.1) refers to Ala. R. App. P. 20, which did away with the requirement of assignments of error in connection with the filing of briefs on appeal. Ala. R. App. P. 40, however, which governs rehearing, continues to require a separate application for rehearing with a supporting brief which hews to that application.

[4] In addition, when a state statute is challenged as violating the Constitution, Ala. Code § 6-6-27 requires service of the relevant pleadings on the Alabama Attorney General. Appellant failed to comply with this requirement.

[5] "An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered." Kirkland v. Kirkland, 281 Ala. 42, 198 So. 2d 771, 777 (1967); *see* Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251 (Ala. 1985); Lovett v. Uptain, 450 So. 2d 113, 116 (Ala. Civ. App. 1983), *aff'd*, 450 So. 2d 116 (Ala. 1984).

sented to the highest State court on a petition for rehearing come too late for consideration here . . . ."[6]

Appellant is wrong in suggesting (Br. at 13) that it would have been improper for it to have asserted its arguments concerning § 12-22-72 in its brief on appeal. Parties have raised such issues and the Alabama court has considered them prior to rehearing. *See, e.g., Air Movers of America, Inc. v. State National Bank*, 293 Ala. 312, 302 So. 2d 517, 533 (1974). Moreover, that the Supreme Court of Alabama has on rare occasions considered such arguments on rehearing[7] does not permit invocation of this Court's jurisdiction in a case where the court did not do so. In *Orr v. Orr*, 440 U.S. 268 (1979), the constitutional claim was first presented on appeal, but was considered by the Alabama court without objection. This Court noted that:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

Id. at 274. The Court emphasized that its conclusion "does not preclude any other State, *or even Alabama in*

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[6] Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 at 701 (1977).

[7] The 17 cases cited by Appellant where the court considered the application of the affirmance statute on rehearing do not indicate a different practice. Eleven of these involved rehearing sought by the appellee asserting the failure of the court to perform the ministerial act of applying the statute. The 11 cases are cited in Appellees' Motion to Dismiss at 8-9 n.6. *Lawrence v. Jones*, 37 Ala. 388 (1861), did not involve rehearing at all, but instead a second appeal claiming that the original judgment had been misinterpreted on remand. It thus has no bearing whatever on the Alabama court's practice on rehearing. In only four cases did the court consider arguments concerning the affirmance statute raised by appellants after judgment, and two of these involved questions of statutory construction never before considered. Motion to Dismiss at 9. The two remaining cases are hardly an indication that the Alabama court regularly considers such late-raised questions.

another case," from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275 n.4 (emphasis added). Since Appellant's constitutional argument was not properly raised and the court did not address it, Appellant has not established the jurisdictional basis for an appeal to this Court.

B. The Allegations Concerning Justice Embry

Appellant's contentions concerning Justice Embry were not presented until more than two months after the decision of the Supreme Court of Alabama in Appellant's motion to disqualify filed February 21, 1985 (J.S. App. 85a), and in its second application for rehearing filed March 22, 1985 (J.S. App. 132a). Since these pleadings were filed wholly outside the scope of the Alabama rules, the Alabama court was under no duty to consider Appellant's request at all. In denying the motion to disqualify, the court gave no indication that it had reached the constitutional question belatedly pressed by Appellant.

Appellant did not attempt to explain why it could not have discovered the relevant facts before more than a year had passed after the filing of the two suits by Justice Embry.[8] Instead, Appellant rests its claim (Br. at 14) on the assumption that the court in fact rendered

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[8] In *Pierce v. Tharp*, 224 Tenn. 343, 461 S.W.2d 950, 953-54 (1970), *cert. denied*, 402 U.S. 929 (1971), one of the parties to a proceeding before the Supreme Court of Tennessee charged, months after the court's decision, that two of the justices were disqualified. The court held that the objection was waived.

> "The matters now brought forward in the petition . . . could have been investigated during the five months waiting period [before oral argument]. But petitioners preferred to rest on their oars until the Court announced its decision, and then come forward with a belated effort to charge that some of the justices on the Court were disqualified to hear the case. If any member of the Court were disqualified to participate in the hearing, such incompetency was waived by failure of petitioners or movents to make objection in limine on the hearing and petitioners are conclusively presumed to have consented to his or their participation in the hearing."

a judgment upon the constitutional issues in rejecting the motion. The Court's order, however, is silent as to any constitutional issues, merely reciting that no justice concluded he was disqualified. J.S. App. 64a. Where the highest state court does not address a federal question, it will be assumed that the omission was caused by the lack of proper presentation. *Exxon Corp. v. Eagerton*, 462 U.S. at 181 n.3. And even if a state court passes on state questions raised on rehearing, but not federal questions, the federal issues may not be presented in this Court. *Fullerton v. Texas*, 196 U.S. 192 (1905). Thus, Appellant's constitutional arguments concerning Justice Embry's qualifications were not properly presented below and cannot be considered by this Court.

C. The Contract Clause and Excessive Fines Clause Questions

Appellant makes no effort to contend that either of these issues was timely raised under Alabama procedure.[9] The extreme tardiness of their presentation was certainly not within any construction of proper procedure in Alabama.

Appellant contends that it was "surprised" by the decision below, and that its failure to raise these issues is thus excused under the doctrine of *Brinkerhoff-Faris Trust & Saving Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff*, the Court held that late-presented federal issues may be considered when they arise as the result of an unexpected and unanticipated holding by the state court. Appellant's arguments, however, do not fall within this exception. The Supreme Court of Alabama here affirmed the judgment of the trial court. And while Appellant contends that it did not expect that the judgment would be affirmed, it does not explain how the

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[9] The Contract Clause issue was not mentioned until Appellant's motion for disqualification on February 21, 1985 (J.S. App. 87a), and was thus in direct violation of Ala. R. App. P. 40 which prohibits successive applications for rehearing. The Eighth Amendment issue was raised initially in Appellant's late-filed brief on rehearing.

rationale employed by the court for the first time created an opportunity to argue that the Eighth Amendment and the Contract Clause had been offended. Appellant's decision not to present those federal issues to the Alabama court was one of tactics or oversight, and the failure of that decision is not the sort of "surprise" contemplated in *Brinkerhoff*.

Finally, Appellant's analysis of the prudential concerns relating to jurisdiction is erroneous.[10] Appellant suggests that if a state court refuses to consider improperly and untimely raised issues, it no longer is entitled to "the proper respect for state functions" that is essential to our federal system. *Younger v. Harris*, 401 U.S. 37, 44 (1971). This argument would deny reasonable state procedural rules any validity and would encourage litigants, such as Appellant, who lose in state courts to then conjure up federal issues as part

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[10] Appellant suggests that in the absence of certain prudential factors the Court may dispense with the requirement that a federal issue must have been raised in the state court. While it is true that this Court's decisions have cast some doubt on the jurisdictional nature of this requirement, *compare* Wood v. Georgia, 450 U.S. 261 (1981) *with* State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945), the requirement should be viewed as absolute. The Constitution (art. III, § 2, cl. 2), states that except for cases under this Court's original jurisdiction, "the supreme Court shall have appellate jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make." Section 25 of the Judiciary Act of 1789 was construed by this Court to absolutely bar appeals from state courts where the federal issue was not timely raised and considered. *E.g.*, Crowell v. Randell, 35 U.S. (10 Pet.) 368 (1836). The statute governing appeals from state courts was repeatedly reenacted without significant change, with the last reenactment occurring in 1948. Judicial Code and Judiciary Act, ch. 646, 62 Stat. 929 (1948) (codified as 28 U.S.C. § 1257). "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ." Lorillard v. Pons, 434 U.S. 575, 580 (1978); *see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982). Appellants here, therefore, may not proceed on the basis of a supposed absence of prudential concerns.

of a last-ditch effort to avoid liability or to cause delay. In *Webb v. Webb*, 451 U.S. 493, 501 (1981), the Court required that "there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law" (emphasis in original). Appellant did not come even close to satisfying this standard.

II. THE ALABAMA AFFIRMANCE STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Ala. Code § 12-22-72 provides that in cases where a trial court judgment awarding money is affirmed on appeal, the appellate court will increase the judgment by ten percent. This statute does not impose any classification based on invidious factors such as race, nor does it affect any fundamental right. As the Court held in *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), litigants have no absolute right to any appellate review. Although states do not have an unfettered right to place restrictions on rights of appeal they do grant, state procedures must be upheld if they are rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985); *Lindsey*, 405 U.S. at 78. In making this analysis, such state actions are given wide latitude and are presumed to be valid. *Cleburne*, 105 S. Ct. at 3254.

The purpose of § 12-22-72 is to discourage frivolous and dilatory appeals, *see Chapman v. Rivers Construction Co.*, 284 Ala. 633, 227 So. 2d 403, 415 (1969), and "to provide appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered," *City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174, 180 (1950). These interests are legitimate since Alabama clearly may act to discourage insubstantial appeals which burden the legal system and to encourage prompt payment of judgments. *See Lindsey*, 405 U.S. at 78. Appellant does not dispute this.

Parties who owe a judgment have every incentive to delay payment by filing an appeal, regardless of its merits. And the incentive to prosecute even a seemingly dilatory appeal increases with the size of the judgment since the marginal cost of additional legal fees becomes quite small compared to the judgment. For losing plaintiffs, however, having already expended the cost for a trial, the further fees required for an appeal are a sufficient disincentive to taking an unmeritorious appeal. Moreover, while delay in payment of judgments extends the time before an injury is redressed, no comparable policy applies with respect to losing plaintiffs. The statute thus is rationally related to the policies it is intended to promote.

Appellant argues (Br. at 21) that the Alabama statute is analogous to the double bond requirement struck down in *Lindsey*. In that case, however, no legitimate state interest was advanced for a bonding requirement which distinguished landlords from tenants. Indeed, there the bonding requirement was placed on those least able to meet it—tenants—and seemed designed to simply foreclose access to an appeal. The Alabama statute instead is directed specifically at parties with an incentive to cause delay.[11]

This Court upheld an identical statute in *Louisville & Nashville Railroad Co. v. Stewart*, 241 U.S. 261, 263 (1916), on these grounds. Justice Holmes wrote:

> "The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas,

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[11] Appellant argues that the existence of Ala. R. App. P. 38 (patterned after Fed. R. App. P. 38) demonstrates that § 12-22-72 is irrational. However, Rule 38 extends to situations not reached by the statutory penalty, including cases where frivolous appeals are taken by plaintiffs, or in cases which do not involve money judgments. Moreover, Appellant was not assessed any liability under Rule 38, thus making this rule irrelevant to Appellant's claim under the Equal Protection Clause.

> and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld."

Where legislatures have made distinctions similar to those made by § 12-22-72, the statutes have been found to reflect a rational balancing of competing interests. In *Empire State Insurance Co. v. Chafetz*, 302 F.2d 828, 830 (5th Cir. 1962), the court denied an Equal Protection Clause challenge to a statute which provided for the award of attorneys' fees in favor of insureds, but provided no similar relief for insurance companies, relying on this Court's decisions in *Life and Casualty Insurance Co. of Tennessee v. McCray*, 291 U.S. 566 (1934), and *Farmers' and Merchants' Insurance Co. v. Dobney*, 189 U.S. 301 (1903). *See Postow v. OBA Federal Savings & Loan Association*, 627 F.2d 1370, 1386-88 (D.C. Cir. 1980) (upholding provision in Truth in Lending Act awarding attorneys' fees only to borrowers).

Indeed, statutes which impose affirmance penalties only on those against whom a judgment was entered are common. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2106; Ga. Code Ann. § 5-6-6; Or. Rev. Stat. § 19.160. Mississippi and Virginia have enacted affirmance statutes which are substantially identical to the Alabama statute. Miss. Code Ann. § 11-3-23; Va. Code § 16.1-113.[12] Finally, the Eleventh Circuit has imposed the Alabama statute in diversity cases, apparently assuming that it is constitutional. *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2704 (1985); *Locke v. Allstate Insurance Co.*, 696 F.2d 1340 (11th Cir. 1983).

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[12] The courts of those states have found that the purpose of these statutes is to discourage frivolous appeals and to compensate holders of judgments. *See* Canal Bank & Trust Co. v. Brewer, 147 Miss. 920, 114 So. 127 (1927); Nationwide Mut. Ins. Co. v. Tuttle, 208 Va. 28, 155 S.E.2d 358 (1967).

Essentially, Appellant argues that the Alabama statute would be better taken if it were more limited. But the Alabama legislature concluded that the statute should apply automatically, perhaps believing that the deterrent effect on non-meritorious appeals would be greater and the burden on the courts of enforcing the penalty would be less. Whether that is so is the business of the legislature. As the Court held in *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955),

> "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

III. JUSTICE EMBRY'S PARTICIPATION DID NOT DEPRIVE APPELLANT OF DUE PROCESS

At the time this case was under consideration by the Supreme Court of Alabama, Justice T. Eric Embry, a member of the court's majority and apparently the author of the court's opinion, was the plaintiff in a putative class action suit against a different insurer, Blue Cross and Blue Shield of Alabama, which alleged a pattern of improper and bad faith denials of insurance claims.[13] As will be discussed *infra*, that suit was dismissed by stipulation of the parties without payment of any sum.[14]

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[13] Another suit involving a claim by Justice Emby, *Embry v. Maryland Cas. Ins. Co.*, DV 84-963 (Jefferson Cty. Dist. Ct.), was settled almost immediately upon the filing of the complaint when the insurer agreed to pay the claim. Those proceedings had terminated on April 6, 1984, before the oral argument or the decision in this case.

[14] Although the class action suit was dismissed on April 16, 1985, Appellant did not reveal this fact in its Reply Memorandum filed May 14, 1985, or in its brief (apart from the docket sheet appended to the brief). The fact that Appellant continued to argue the effect of the Blue Cross suit after it knew that it had been dismissed and the circumstances of the dismissal (*see infra* pp. 21-25) is unfortunately similar to the series of misrepresentations resorted to by Appellant below (*see supra* pp. 1-6) which resulted in the punitive damage award.

Without pointing to anything in the opinion or proceedings of the court below which evidences improper bias on the part of Justice Embry, Appellant relies on the mere existence of the suit and a few out-of-context remarks by Justice Embry in a deposition to claim that his participation in the nine-member court's consideration of the case deprived it of due process and, further, that any remaining members of the court who did not remove themselves from the plaintiff class must also be disqualified from considering the case on remand.[15] Despite Appellant's arguments, Justice Embry's lawsuit did not require his disqualification or, by extension, the disqualification of the other justices of the Alabama court.

A. Questions as to the Qualifications of a Justice of a State Supreme Court Are Limited and Should be Left to the Discretion of the Justice

Since this case arises from a state court, this Court's review is limited to determining whether there has been a constitutional violation, as opposed to deciding whether Justice Embry's role conflicts with standards set by statute or by a court's supervisory powers. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), the Court explained that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." The Court in *FTC v. Cement Institute*, 333 U.S. 683, 702

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[15] This is a different position than that taken by Appellant in its Jurisdictional Statement (at 9 n.2) where it stated that it "does not bring to this Court the question of whether the membership of the eight other Justices . . . in the putative class . . . [is] sufficient to disqualify those Justices under the Due Process Clause . . . from future participation in this case on remand . . . ." Having specifically set aside any question relating to the members of the court other than Justice Embry, Appellant cannot add an issue concerning them now. *See* Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376, 386 n.12 (1960). In any event, since the case has been settled, there can be no question about the qualifications of the remaining justices.

(1948), again emphasized that "most matters relating to judicial disqualification did not rise to a constitutional level." *See also United States ex rel. Perry v. Cuyler*, 584 F.2d 644, 645 (3d Cir. 1978), *cert. denied*, 440 U.S. 925 (1979).[16]

In addition, the standard for reviewing Justice Embry's decision on his qualifications as an appellate judge is different from review in the situation of a trial judge's decision not to recuse himself. The American Bar Association Standards Relating to Appellate Courts (1977) recognize this distinction. The Commentary to § 3.42 notes that while a trial judge's decision on his own qualifications is subject to review by other judges,

> "[i]n the case of an appellate judge . . . that procedure would subject the judge to decision of his disinterestedness by official peers with whom he may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's 'bias' is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself.
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> * * * *
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> "In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discre-

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[16] As the commentators have noted, the practices of the states as to judicial disqualification vary widely. Some allow parties to require the recusal of a judge almost on request, and others instead set a high standard for disqualification. *See, e.g.*, Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Prob. 43, 65-66 (1970); Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 608-09 (1947). The differentiation between constitutional and statutory standards, therefore, appropriately recognizes the wide divergence in state practice.

> tion reposing in a trial judge . . . . Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views." [17]

In the absence of an extreme abuse of discretion, therefore, the decision on Justice Embry's qualifications to participate in this case was one for him to make.[18]

B. Justice Embry Had No Prohibited Interest in the Outcome of This Appeal

Justice Embry's lawsuit against Blue Cross gave him no direct interest in the outcome of this suit against Appellant, a different insurer, involving different claims and different facts. The overlapping interests Appellant identifies (Br. at 23-24) are either nonexistent or so remote and contingent as to pose no reasonable question about Justice Embry's qualifications.

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[17] *See* Ellis v. Minneapolis Commission on Civil Rights, 295 N.W.2d 523, 525 (Minn. 1980). Pointing out the same concerns in *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897 (1945) (Jackson, J., concurring), Justice Jackson concluded that "[t]here is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case." *See also* Nadelmann, *Disqualification of Constitutional Court Judges for Alleged Bias?* 52 Judicature 27, 28 (1968). In *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J.), the motion to recuse was decided solely by Justice Rehnquist.

[18] This entire dispute is occasioned by the existence of Ala. Code § 12-2-14, which authorizes the appointment of special justices in the event disqualifications result in an even-numbered court which is evenly divided on a matter. In a similar case arising in this Court, of course, even without the ninth justice's participation, the judgment would have been affirmed by the vote of the remaining justices. *See, e.g.*, Kissinger v. Halperin, 452 U.S. 713 (1981) (per curiam). Appellant's due process claim thus seems particularly dubious, given that it would have no claim at all but for Alabama's unique statute.

As noted above, Justice Embry's suit was dismissed by stipulation among the parties. The stipulation, agreed to by Blue Cross and Justice Embry, states that

> "[t]he primary objective of the institution of this suit . . . was to emphasize to defendant Blue Cross . . . that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. *Blue Cross recognizes that some problems have occurred in the past* and is determined to minimize them in the future." [19]

Blue Cross conceded the inadequacy of the procedures complained of, including a practice of denying claims without any determination of whether information sufficient to process the claim was already in the insurer's files. The stipulation does not indicate that any damages, actual or punitive, were paid. It is apparent from this judicially approved stipulation that Justice Embry's goal in the litigation with Blue Cross was reform of its payment system, not pecuniary gain to himself. Whatever result was reached on the specific facts of Appellees' claim, which did not include a contention that Appellant did not search for information in its possession needed to process their claim, thus had no bearing on the outcome of Justice Embry's suit.

The argument that the decision below changed the law in Alabama in a manner beneficial to Justice Embry is simply wrong. Contrary to Appellant, the Alabama courts have never regarded either partial payment of a claim or the presence of an issue which would prevent a directed verdict on the contract claim as an absolute bar to recovery for bad faith denial of claims. They are, rather, no more than rebuttable evidentiary presumptions.[20] And

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[19] Stipulation for Dismissal ¶ 1, Embry v. Blue Cross and Blue Shield of Alabama, Civ. Act. No. CV-84-500-447-JDC (Jefferson Cty. Cir. Ct., filed April 16, 1985) (emphasis added). The stipulation is reproduced in the Appendix to this brief.

[20] The case relied on by Appellant for its assertion of an absolute defense of partial payment is *Sexton v. Liberty Nat'l Life Ins. Co.*,

the Alabama court's decision here emphasized that its holding was based on the facts before it: "Clearly, then, under the evidence *in this case*, the 'directed verdict on the contract claim' test is inapplicable because this is not the ordinary or normal case." J.S. App. 22a (emphasis in original); *see* J.S. App. 12a. Thus, the decision below did not change the state of the law of bad faith in Alabama (a point not disputed by even the four dissenting justices),[21] and the court's emphasis on the particular facts

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405 So. 2d 18 (Ala. 1981). In *Sexton*, the partial payment was considered evidence of a lack of bad faith, but the court expressed no rule that partial payments would bar a finding of bad faith. Even Appellant concedes (Br. at 4), somewhat differently from its characterization at p. 23 of its brief, that *Sexton* only seemed to *generally* preclude liability. *See also* Brief of American Council of Life Insurance, *et al.*, at 4 n.6. The decision below did not change any rule announced in *Sexton* or elsewhere; it merely rejected Appellant's erroneous characterization of the *Sexton* holding. Even Justice Maddox in his dissenting opinion did "not suggest that partial payment . . . would preclude a finding of bad faith . . . ." J.S. App. 62a; *see* J.S. App. 32a-33a.

Similarly, with respect to the directed verdict requirement, the source of the purported rule is *National Sav. Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982). The court's discussion of the issue began with "[i]n the *normal case*" (*id.* at 1362), emphasizing that cases outside the norm might be different. Moreover, in *Safeco Ins. Co. v. Sims*, 435 So. 2d 1219, 1223 (Ala. 1983), the court specifically held that "the finding of justiciable controversy is not the determining factor . . . ." This point was emphasized in Justice Jones' concurring opinion. *Id.* at 1224-25. In the decision below, Chief Justice Torbert's dissenting opinion also did not disagree with the majority on this point—"a blind adherence to the directed verdict rule would essentially abolish the tort." J.S. App. 54a.

[21] The other two claimed effects, Br. at 23-24, are even more farfetched. The effect of the affirmance of a large punitive damage award in one case on the basis of a record which showed repeated, wholly improper denials of a claim and then further misrepresentations designed solely to avoid liability, on another case not involving those facts is totally speculative. Particularly in this case, where Justice Embry was not anticipating a monetary award but instead a revision of Blue Cross procedures, the contention is entirely unwarranted. And since the tort of bad faith denial of an

in this case belies any thought of Justice Embry that it could affect his case.[22]

If the final stipulation is any indication, Justice Embry did not anticipate any monetary award on a bad faith claim from the Blue Cross suit and, unlike the judges in the cases relied upon by Appellant, had no direct interest in the outcome of this case. In *Tumey v. Ohio*, 273 U.S. 510 (1927), conviction of the defendant would have directly increased the judge's income. Similarly, in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), conviction would have lessened the financial difficulty of running the village for which the judge/mayor was responsible. These were direct interests where disposition of the case *sub judice* would ineluctably have affected the interests of the judge.[23]

Instead, this case more closely resembles *Department of Energy v. Brimmer*, 673 F.2d 1287, 1294-95 (Temp. Emer. Ct. App. 1982), in which the district judge held stock in oil companies which were involved in the program at issue, but were not among the parties before him. The court held "that the judge does not have a direct economic or financial interest in the outcome of the

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insurance claim has been termed "merely a species of fraud," Dumas v. Southern Guar. Ins. Co., 408 So. 2d 86, 89 (Ala. 1981), the characterization of Appellant's conduct as "fraudulent" was a normal reference, rather than some convoluted effort to establish an additional cause of action.

[22] It is particularly noteworthy that Justice Embry, in his deposition in the Blue Cross case, indicated little, if any, knowledge of the theory of his case, stating "I gave all these facts that I knew to Mr. Rutledge [his attorney] and he represents me. His theory of law and all is what I'm travelling under. I don't have any independent thoughts about it." J.S. App. 192a.

[23] The facts in this case are even further from situations where the judicial and prosecutorial functions are combined, *see* Withrow v. Larkin, 421 U.S. 35 (1975); *In re* Murchison, 349 U.S. 133 (1955), or where an adjudicative body is established composed of members of a profession who have an inherent bias against competing professionals, *see* Gibson v. Berryhill, 411 U.S. 564 (1973).

case, and thus could hear it without contravening the constitutional requirements of due process." [24]

At the common law, judges could only be disqualified for a direct pecuniary interest in the case at bar. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609-10 (1947). Although the reasons for which judges are disqualified have grown, the core remains a direct interest in the outcome of the case. "To work a disqualification of the judge, 'the liability or pecuniary gain or relief to the Judge must occur upon the event of the suit, not result remotely in the future from the general operation of law and government upon the status fixed by the decision.'" *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51, 56 (1946) (*quoting Piuser v. Sioux City*, 220 Iowa 308, 262 N.W. 551, 557 (1935)). In Alabama, "[t]he interest which will disqualify a judge must be *direct and immediate.*" *Webb v. Town of Eutaw*, 9 Ala. App. 474, 63 So. 687 (1913) (emphasis added). The legislative history of the present version of 28 U.S.C. § 455 also reflects a focus on direct economic interests. *See* H.R. Rep. No. 1453, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6351, 6356.

The interest of Justice Embry here was at most remote and speculative, and not a direct interest. His participation was not in violation of even state standards and clearly did not deprive Appellant of due process.

C. There is No Evidence of Any Improper Bias Against Appellant

Justice Embry was also not disqualified for bias in light of his deposition testimony in the Blue Cross case. Read in context, this testimony shows no deep-seated prejudice against insurance companies. The focus of the

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[24] *See also* Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521, 523-24, *cert. denied*, 275 U.S. 571 (1927) (no disqualification where judge held stock in title insurance company not a party but insuring similar trust deeds); City of Valdosta v. Singleton, 197 Ga. 194, 28 S.E.2d 759, 763 (1944) (judge not disqualified because legal question may arise in litigation affecting him or his property).

deposition was several instances where Justice Embry or his late wife had had claims denied. In discussing one instance (J.S. App. 165a-66a), Justice Embry recounted Maryland Casualty's refusal to acknowledge the scheduled coverage of a mink coat, a claim which was promptly settled after he filed suit. *See supra* note 13. Immediately after the language cited by Appellant (Br. at 6), Justice Embry commented that once the suit "got their attention, they were very nice about it" (J.S. App. 166a), a comment which hardly reflects any persistent hostility. Indeed, after describing a difficulty with Blue Cross in 1968, the following colloquy occurred:

> "Q. Now, did you have any other difficulty with any type of hospital or medical insurance or health insurance claim?
>
> "A. Not with other companies, no.
>
> "Q. Never had any with any other company?
>
> "A. No."

(J.S. App. 176a). Whatever dispute Justice Embry had with Blue Cross (which Blue Cross conceded was justified), his deposition does not evince any views whatever with respect to Appellant.

Disqualifying bias must be "personal, i.e., directed against the party." *United States v. Carignan*, 600 F.2d 762, 763 (9th Cir. 1979). Further, "'[i]t is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally.'" *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (*quoting Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956)). Nothing in the record indicates that Justice Embry had such a personal bias against Appellant.[25]

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[25] Significantly, Justice Embry did rescue himself in a case decided within two weeks of the one at bar which involved Blue Cross. Blue Cross & Blue Shield of Alabama v. Granger, 461 So. 2d 1320, 1329 (Ala. 1984).

Further, the Supreme Court of Alabama has held that

> "Bias and prejudice must be shown by the conduct of the trial judge and may not be presumed or inferred by his subjective views . . . . Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice."

Hartman v. Board of Trustees of the University of Alabama, 436 So. 2d 837, 841 (Ala. 1983) (citations omitted). Appellant wholly failed to meet its burden of establishing such bias.

Whatever general views Justice Embry had on the law of bad faith denial of insurance claims cannot rise to the level of disqualification. This Court in *FTC v. Cement Institute*, 333 U.S. at 702-03, held that

> "Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."

The D.C. Circuit also concluded that "[i]t is well established that the mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case." *Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980, 990 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985); *see also Laird v. Tatum*, 409 U.S. 824, 829-37 (1972) (Rehnquist, J.).[26]

Finally, Justice Embry's voting record belies the existence of any fixed prejudice against insurance companies. In 12 decisions involving bad faith denial of insurance claims during the period from the filing of the first suit Appellant complains of to the end of 1984, Justice Embry voted for the defendant insurance company in nine, including three cases in which the "directed verdict"

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[26] Indeed, the Commentary to the Standards Relating to Appellate Courts recognizes that an appellate judge's view on the law cannot form the basis of a request for recusal. See *supra* pp. 20-21.

standard which Appellant claims he was bent on overturning was found applicable.[27] Justice Embry's role in the deliberations of the Alabama court was not, therefore, in derogation of Appellant's right to due process. *A fortiori*, the same is true for the other justices of the Alabama court. The court's decision should consequently be affirmed.

IV. THE SUPREME COURT OF ALABAMA'S RECOGNITION OF THE BAD FAITH TORT DID NOT CONTRAVENE THE CONTRACT CLAUSE

For more than a century this Court's decisions have explicitly held that the Contract Clause of the federal Constitution is a limitation only on state legislative actions, not on decisions of state courts. This unbroken line of precedent repudiates Appellant's claim that its Contract Clause rights were violated by the Supreme Court of Alabama's recognition of the tort of bad faith denial of insurance claims.

A. This Court and Other Courts Consistently Have Held That the Contract Clause Does Not Apply to Judicial Action

This Court's most thorough examination of whether the Contract Clause applies to state judicial acts is in *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924). There, a minor conveyed title to land to the Tidal Oil Company and, after attaining his majority, conveyed title to a second party. The holder of title through the second conveyance received a judgment in his favor to quiet

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[27] Bowers v. State Farm Mut. Auto. Ins. Co., 460 So. 2d 1288 (Ala. 1984); Watkins v. Life Ins. Co. of Georgia, 456 So. 2d 259 (Ala. 1984); Payne v. Nationwide Mut. Ins. Co., 456 So. 2d 34 (Ala. 1984); Armstrong v. Life Ins. Co. of Virginia, 454 So. 2d 1377 (Ala. 1984); National Sec. Fire & Cas. Co. v. Vintson, 454 So. 2d 942 (Ala. 1984); Gibson v. Fidelity & Cas. Co. of New York, 454 So. 2d 526 (Ala. 1984); Stewart v. State Farm Ins. Co., 454 So. 2d 513 (Ala. 1984) (opinion by Embry, J.); Dickey v. Alabama Farm Bureau Mut. Ins. Co., 447 So. 2d 693 (Ala. 1984); Garvin v. Shewbart, 442 So. 2d 80 (Ala. 1983). The decisions in *Payne*, *Armstrong* and *Vintson* applied the "directed verdict" standard.

title. The state supreme court affirmed, holding that the deed and agreements under which Tidal Oil claimed title were void because the conveyor was a minor. Tidal Oil claimed that the state supreme court's decision "changed a rule of property of the state upon the faith of which the deed, leases and other contracts set up by defendants were made, and thus impaired their obligation in violation of" the Contract Clause. *Id.* at 449.

In rejecting Tidal Oil's arguments, the Court unequivocally stated that

> "[i]t has been settled by a long line of decisions, that the provision of section 10, article 1, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts." *Id.* at 451 (footnote deleted).[28]

Noting that "[t]he language . . . plainly requires such a conclusion," the Court stated that contrary readings of the clause had resulted in "persistent error." *Id.* at 451.[29]

Decisions of this Court[30] and numerous other courts[31] presaged and have unwaveringly followed the *Tidal Oil*

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[28] The Court cited 19 of its decisions dating to 1847 which held that the Contract Clause applies only to legislative actions. 263 U.S. at 451 n.1.

[29] The appellant in *Tidal Oil* squarely presented the Court with a Contract Clause question: "The error[] here assigned [is] . . . that the Supreme Court of the State . . . impaired . . . [a contractual] obligation in violation of § 10, Article 1, of the Federal Constitution." 263 U.S. at 449. The Court's lengthy, detailed discussion of this point and its conclusion that the clause is not implicated by state court rulings conclusively refute Appellant's assertion (Br. at 30) that *Tidal Oil* did not decide the extent to which the Contract Clause applies to state judicial actions.

[30] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 260 (1953); Fleming v. Fleming, 264 U.S. 29, 31 (1924); Rooker v. Fidelity Trust Co., 261 U.S. 114, 118 (1923); Central Land Co. v. Laidley, 159 U.S. 103, 109 (1895); New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U.S. 18, 30 (1888).

[31] *See, e.g.*, Frazier v. Lowndes Cty. Bd. of Education, 710 F.2d 1097, 1099 (5th Cir. 1983); Mariniello v. Shell Oil Co., 511 F.2d

interpretation of the Contract Clause. Appellant is unable to accurately cite a single case in which the Supreme Court has held the clause applicable to judicial rulings, thus demonstrating that its revisionist view of the clause is wholly unsupported and patently erroneous.[32]

B. Appellant's Historical Analysis Is Flawed and Ignores the Plain Language of the Contract Clause

Appellant argues that the framers should be found to have included "common law" in the definition of "Law" in article 10, section 1 of the Constitution. Br. at 31-34. This narrow focus on a single word ignores both the context of section 10 and the "occasion and general purpose of the contract clause," [33] which refute any suggestion that the clause reaches beyond legislative enactments.

Appellant is correct that language in the Ordinance for the Northwest Territory guaranteeing "security to *bona fide* private contracts was the immediate cause for the proposal of a similar clause in the Federal Convention," [34] but the Ordinance's language did not include "judicial creation of common law obligations." Br. at 3 n.7.[35]

853, 859 (3d Cir. 1975); Ruth v. Bituminous Cas. Corp., 427 F.2d 290, 293 (6th Cir. 1970).

[32] The American Council of Life Insurance, *et al.*, argue (Br. at 10 n.13) that the correct view is that of *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 220 (1864), which, they contend, found that a valid contract cannot be impaired by judicial action which interprets a statute. The *Tidal Oil* Court was well aware of, but not persuaded by, *Gelpcke*, citing it as a case "relied on to sustain the error" that judicial action could violate the Contract Clause. 263 U.S. at 451.

[33] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-428 (1934).

[34] B. Wright, Jr., *The Contract Clause of the Constitution* 8 (1938).

[35] The language in the Northwest Territory Ordinance to which Appellant refers, *i.e.*, that "no law ought ever to be made . . . that shall . . . interfere with or affect private contracts, or engagements *bona fide*," Art. II, 44 Stat. 1852 (pt. 1), was apparently inserted at the instigation of the Reverend Manassah Cutler, a lobbyist for the Ohio Company. *See* B. Wright, *supra*, at 7. The

Moreover, records of the Federal Convention of 1787 show that after debate on the Contract Clause, the language adopted was not that of the Northwest Ordinance, but John Rutledge's proposed wording, *i.e.*, "nor pass bills of attainder nor retrospective laws." B. Wright, *supra*, at 9. It is likely that Rutledge moved to associate these words with the Contract Clause to clarify, in response to a question by James Madison, that the clause was not redundant in light of the restriction on *ex post facto* laws. The latter applied only to acts of Congress, while the purpose of the Contract Clause was to restrict acts of state legislatures. *Id.* The verb—to "pass"—was in place from the clause's inception; it was not, as Appellant suggests (Br. at 36 n.11), inserted only as a later style change.[36]

In light of this history, the Court has correctly emphasized that the clause on its face, and in the context of article I, section 10, plainly states its limitations: "The language—'No state shall * * * *pass any* * * * *law* impairing the obligations of contracts'—plainly requires such a conclusion [that the Clause applies only to legislation]." *Tidal Oil*, 263 U.S. at 451 (emphasis in original).[37] Appellant's attempt to inflate the word

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Ohio Company was negotiating for the grant of a large tract of land within the Northwest Territory and was anxious that its transactions not be "interfered with by the territorial *legislatures* which were to be established under the Ordinance." *Id.* (emphasis added). Thus, the Ordinance was also directed at legislative action.

[36] In describing the clause in a letter to the governor of Connecticut, Roger Sherman and Oliver Ellsworth—two of the framers—stated: "The restraint *on the legislatures* of the several states respecting . . . impairing the obligation of contracts . . . was thought necessary as a security to commerce . . . ." (emphasis added) *quoted in* Hunting, *The Obligation of Contracts Clause of the United States Constitution* 113 (1919) (reprint 1976).

[37] *See also* Barrows v. Jackson, 346 U.S. at 260 (The "short answer . . . is that [the Contract Clause] . . . , as its terms indicate, is directed against legislative action only."); Cross Lake Shooting & Fishing Club v. Louisiana, 224 U.S. 632, 638 (1912) ("[The Contract Clause], as its terms disclose, is not directed

"Law" to include the common law would simply delete the clause's operative word—"pass"—which clearly implies legislative action, not a judicial decision.

The Court has never construed the clause inconsistently with its language, nor doubted that the clause is limited by the framers' unambiguous intention that it be applied only to legislative action.[38] Even in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the principal case relied upon by Appellant, the Court was faced with a state statute, not a judicial ruling. Appellant has advanced no legitimate justification, nor is there any, for the unprecedented expansion of the clause which would be necessary for it to govern this case.[39] Appellant also has failed to develop objective, reliable, and administrable standards for distinguishing between judicial decisions which create law as opposed to those which simply interpret existing law. In these circumstances, the Court should entertain no doubts about adhering to two centuries of settled practice by affirming that the clause applies only to legislative action.[40]

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against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the State.").

[38] *E.g.*, United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 15 (1977); Home Bldg. & Loan Ass'n Blaisdell, 290 U.S. at 427.

[39] Appellant contends that the Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), is evidence that the word "Laws" in the Contract Clause includes "common law" decisions. In *Swift*, the Court held that the term "laws of the several states" in Section 34 of the Judiciary Act of 1789, 1 Stat. 73, 92 (*codified* at 28 U.S.C. § 1652), did not include state court rulings. *Erie* overruled, holding that the phrase includes "unwritten as well as written" laws. 304 U.S. at 72-73 & n.5. However, as Appellant itself points out, the historical flaws of *Swift* were well known to the court long before the *Blaisdell* and *Tidal Oil* decisions.

[40] Even assuming *arguendo* that the Contract Clause applies to state judicial action, it cannot benefit Appellant. By recognizing a new cause of action in tort, *see* Gulf Atlantic Life Ins. Co. v.

V. APPELLANT HAS NOT STATED A VALID CLAIM UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

A. The Eighth Amendment Does Not Apply to Civil Proceedings

This Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), held that the Eighth Amendment applies only in cases involving criminal sanctions. The Court stated that

> "[b]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."

Id. at 664. This holding was soundly based upon historical evidence that the Amendment was intended to be confined to criminal cases, and confirmed the Court's long-standing holding in *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833), that "[t]he eighth amend-

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Barnes, 405 So. 2d 916 (Ala. 1981); Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1 (Ala. 1981), the Supreme Court of Alabama in no way altered the terms of Appellant's contracts or increased its liability under these contracts. While requiring as a factual predicate the existence of a valid insurance contract between plaintiff and defendant, the tort of bad faith failure to pay a legally owed insurance claim is itself entirely extra-contractual. *See* Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368, 374 (1978). Moreover, as demonstrated in Argument VI *infra*, Appellant had ample advance notice of the adoption of the bad faith tort in Alabama, and has no legitimate reliance-based interest or other ground for challenging the punitive damage award. No credence can be accorded to Appellant's claim that it could not have anticipated the bad faith tort in 1967 when it first signed a contract to provide group health insurance for City of Mobile employees. Surely Appellant renegotiated its contract with the City at least annually, recalculating its rates each time based on all actuarial factors, including the possibility of damage awards. In these circumstances, the Supreme Court of Alabama cannot be found to have unconstitutionally impaired Appellant's contractual relations.

ment is addressed to courts of the United States exercising criminal jurisdiction." Because the punitive damages at issue here were imposed by a jury in a civil proceeding, Appellant cannot include itself within the embrace of the Eighth Amendment.

Appellant incorrectly cites *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality), and *In re Gault*, 387 U.S. 1 (1967), for the proposition that the Eighth Amendment is applicable to non-criminal cases. Br. at 40. In both of these cases the Court clearly indicated that it viewed the penalties reviewed as criminal punishments imposed in criminal proceedings. *Trop*, 356 U.S. at 99; *Gault*, 387 U.S. at 24, 36, 49 & 50. Moreover, *Gault* did not even involve an Eighth Amendment question.[41]

Appellant's attempt (Br. at 40-43) to quarry the history of Magna Carta's "excessive amercement" provision for evidence that the Eighth Amendment applies to civil proceedings is equally unavailing. Initially, the relevance of this discussion is obscure, given that Magna Carta predated the modern separation between civil and criminal proceedings. *See* 2 F. Pollock & F. Maitland, *The History of English Law* 447, 523-24 (2d ed. 1909). Further, under English practice at the time, amercements were distinguished from criminal fines. *Id.* at 516. Moreover, Appellant's historical research demonstrates no more than that fines were "a common *criminal sanction* in 13th-

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[41] Appellant patently mischaracterizes *Ingraham*, 430 U.S. at 669 n.37 and 671 n.40, as having cited *Trop* and *Gault* to be "examples of punishment administered in non-criminal proceedings to which the Eighth Amendment is applicable." Br. at 40. In note 37, while the Court noted that the state in *Gault* had not explicitly labelled a delinquency proceeding as "criminal," it plainly rejected this assessment by stating that incarceration of juveniles is analogous to a criminal punishment. In note 40, the Court stated that *Trop* held denationalization to be "an impermissible punishment for wartime desertion . . . established at a criminal trial." It is difficult to construct any interpretation of this statement which supports Appellant's claim that the *Ingraham* Court would apply the Eighth Amendment to non-criminal proceedings.

Century England." *Br.* at 42 (*quoting Solem v. Helm*, 463 U.S. 277, 284 n.8 (1983) (emphasis added)). This statement rather obviously supports, not undermines, the long-standing principle that the scope of the Eighth Amendment does not extend beyond criminal proceedings. Appellant also has failed in any way to contradict the evidence correctly adduced by the Court in *Ingraham*, 430 U.S. at 664-668, as direct support for its decision reaffirming that the Eighth Amendment applies only in criminal cases.

B. The Punitive Damages Assessed Against Appellant Are Not a Criminal Penalty Subject to the Eighth Amendment

Appellant seeks to shoehorn this case into the Eighth Amendment by arguing that punitive damages should be regarded as the functional equivalent of a criminal penalty. Br. at 39-40. This argument cannot alter the fact that the Alabama judicial system indisputably employed civil rather than criminal procedures to impose punitive damages upon Appellant for its tortious conduct. Because Eighth Amendment scrutiny is inappropriate unless the state has in fact utilized criminal procedures, the question before this Court is not whether the punitive damage award against Appellant comports with the Eighth Amendment, but whether Alabama was required under the Due Process Clause to accord Appellant criminal-type procedures. *Ingraham*, 430 U.S. at 671 n.40.

Despite its rhetorical complaint that Appellees' civil action lacked the safeguards of a criminal proceeding, Br. at 49, Appellant has not identified a single criminal procedure required by the Constitution which it believes Alabama erroneously failed to provide. The only protection which Appellant could even argue it did not receive is the standard requiring proof beyond a reasonable doubt. Yet this Court's precedents plainly demonstrate that the weighted reasonable doubt standard is required only for those exceptional cases, such as criminal proceedings, which involve personal interests of transcendent constitu-

tional value.[42] By contrast, Appellant's liability was limited to a money judgment which does not warrant and cannot justify invoking the reasonable doubt standard.[43]

Appellant has failed to present this Court with any cogent reason for regarding punitive damages as criminal in nature. Punitive damages for tortious or other unlawful conduct have been imposed as civil penalties, not criminal punishment, in England and in the United States by both federal and state courts for over two centuries. This Court itself has on numerous occasions upheld or otherwise ruled upon punitive damage awards and other penalties imposed in civil proceedings without once indicating, much less holding, that criminal procedures should have been followed.[44] There are at least 19 federal statutory

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[42] The Court has limited this standard to criminal cases, including juvenile delinquency proceedings as in *Gault*, on the grounds that

> "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."

In re Winship, 397 U.S. 358, 363 (1970). The judgment rendered against Appellant, however, did not result in criminal stigmatization or the loss of any party's personal liberty through incarceration.

[43] *See* Santosky v. Kramer, 455 U.S. 745, 755 (1982) ("while private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' ") (*quoting* Addington v. Texas, 441 U.S. 418, 423 (1979)).

[44] This Court has recognized explicitly that punitive damages are customarily imposed as a civil penalty. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (punitive damages found to be "private fines levied by civil juries"). In *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 460 n.15 (1977), the Court specifically recognized that legislatures have the power to impose civil rather than criminal fines. These and similar cases amply reveal that, while all criminal offenses may be punished by fines, not all fines are punishments for criminal offenses.

provisions which authorize the imposition of punitive damages in a civil proceeding,[45] and at least 21 others which authorize treble damages as a civil penalty.[46] Presumably these and other federal statutory provisions authorizing civil penalties against private parties—as well as numerous state statutes and common law rules providing for similar civil sanctions—would be rendered unconstitutional if two centuries of practice are reversed by holding that punitive damages cannot be imposed in civil proceedings.

Appellant nevertheless argues that punitive damages must be regarded as criminal in nature because they serve two purposes of criminal law by punishing a party for oppressive conduct and deterring that party and others similarly situated from committing equally reprehensible conduct in the future. Br. at 39. This contention is flatly contradicted by the holding in *Ingraham* that the corporal disciplinary action there at issue, which served both to punish and to deter, was not a criminal penalty governed by the Eighth Amendment.[47] The Court

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[45] *See* 11 U.S.C. § 303(i)(2)(B); 11 U.S.C. § 362(h); 11 U.S.C. § 363(n); 12 U.S.C. § 1723a(e); 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 298(c); 15 U.S.C. § 1116(d)(11); 15 U.S.C. § 1681n(2); 15 U.S.C. § 1691e(b); 26 U.S.C. § 7431(c)(1)(B)(ii); 33 U.S.C. § 1514(c); 42 U.S.C. § 3612(c); 42 U.S.C. § 9607(c)(3); 45 U.S.C. § 831(j); 49 U.S.C. § 1679b(a)(1); 49 U.S.C. § 1810(a); 49 U.S.C. § 2008(a)(1); and 50 U.S.C. § 1810(b).

[46] *See* 7 U.S.C. § 2564(b); 12 U.S.C. § 1464(q)(3); 12 U.S.C. § 1975; 12 U.S.C. § 2607(d)(2); 12 U.S.C. § 2608(b); 15 U.S.C. § 15(a); 15 U.S.C. § 15c(a)(2); 15 U.S.C. § 72; 15 U.S.C. § 78u(d)(2)(A); 15 U.S.C. § 1117(a); 15 U.S.C. § 1117(b); 15 U.S.C. § 1693f(e); 15 U.S.C. § 1989(a)(1); 22 U.S.C. § 4209; 30 U.S.C. § 689(b); 35 U.S.C. § 284; 45 U.S.C. § 83; 46 App. U.S.C. § 1227; 46 U.S.C. § 10711; 47 U.S.C. § 503(a); and 49 U.S.C. § 11902.

[47] Treble damages, like punitive damages, serve both to punish and to deter. *See* American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 575 (1982). Under Appellant's reasoning which focuses upon these two objectives, treble damages could not continue to be regarded as civil if punitive damages are reclassified as criminal.

stated that "[a]lthough an imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply, the Court has never held that *all* punishments are subject to Eighth Amendment scrutiny." 430 U.S. at 670 n.39 (emphasis in original). Because punitive damages have historically been regarded as a civil penalty, and are not imposed in proceedings which bear the attributes of criminal law by subjecting the wrongdoer to stigmatization or possible imprisonment, they do not constitute a criminal penalty subject to the Eighth Amendment or other constitutionally-mandated criminal procedures.[48] The Court would only subject itself to a veritable flood of appeals seeking to relitigate civil penalties assessed by both federal and state courts if it finds punitive damages to be criminal sanctions reviewable under the Eighth Amendment.[49]

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[48] The body of case law headed by this Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is not to the contrary. These cases have examined in various contexts whether penalties imposed by federal statutes are criminal or civil. In *United States v. Ward*, 448 U.S. 242, 248-54 (1980), the Court held that a monetary fine intended by Congress to be a civil penalty did not function as a criminal punishment, even where the underlying conduct was a criminal offense. In other cases, and in *Kennedy*, the Court has generally focused upon whether the penalty reveals a "punitive design" by imposing a drastic personal deprivation, such as imprisonment, denationalization, or deportation, in the manner of a criminal sanction without any absolving remedial purpose. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 617 (1960). Here Alabama has imposed a monetary penalty, not a drastic personal deprivation, for conduct which is not per se regarded as a criminal offense in Alabama. Moreover, this penalty does not function in the manner of a criminal sanction because it does not result in stigmatization or imprisonment, and it serves legitimate non-punitive objectives by compensating plaintiffs for actual injuries and providing an incentive for persons to file civil suits against insurance companies for tortious misconduct which might otherwise go unremedied.

[49] The Court in *Ingraham*, 430 U.S. at 670 n.39, rejected the proposition that "the judgment of which disciplinary punishments are reasonable and which are excessive [is] a matter of constitutional principle in every case, to be decided ultimately by this Court."

C. The Punitive Damages Assessed Against Appellant Are Not Excessive

Assuming *arguendo* that punitive damages are subject to Eighth Amendment scrutiny, the $3.5 million assessment against Appellant does not violate the Excessive Fines Clause. The only argument which Appellant is able to muster against the amount of the award is that it bears a mathematical relationship to Appellees' actual damages on the insurance claim which Appellant deems to be unreasonable. Br. at 44-46. This argument is not only incorrect on the law, it is beside the point because it constructs an artificial comparison between two unrelated figures which entirely ignores the purpose of punitive damages.

Simply put, the mathematical ratio between a penalty and the victim's monetary recovery is irrelevant under the Eighth Amendment. The Amendment's focus is solely upon whether the penalty is disproportionate to the severity of the misconduct. *Solem v. Helm*, 463 U.S. at 284. In punitive damage cases as well, this Court consistently has recognized that the ratio between punitive and actual damages is of no consequence.[50] In *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), the Court stated that

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[50] It is immaterial that some state and federal statutes or rules impose specific monetary limitations on civil penalties, or require the award to bear some proportion to actual damages in certain circumstances. These varying approaches demonstrate simply that Congress and the states have utilized their broad policy-making discretion in this area by adopting several different approaches in various legal and factual contexts. Indeed, the wide variety of approaches adopted reveals that the decision as to which approach is suitable for a particular situation under state law is a policy determination best left to state courts and legislatures. Moreover, at least one of the statutory provisions cited by *amici*, if applied in this case, could have resulted in a larger award for Appellees. The Montana statute noted with approval in the Brief of American Insurance Association, *et al.*, at 23 n.24, authorizes an award equal to 1% of the defendant's net worth, which in this case could have resulted in punitive damages against Appellant of approximately $43 million. *See* Directory of Corporate Affiliations 15 (1985).

> "[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff."

In *Massachusetts Bonding & Insurance Co. v. United States*, 352 U.S. 128, 133 (1956), the Court emphasized that "[b]y definition, punitive damages are based upon the degree of the defendant's culpability," and specifically recognized the propriety of large punitive damage awards "[w]here the degree of fault is high, but the pecuniary injury slight." Appellant has not even attempted to demonstrate, nor can it, that the punitive damages assessed against it are excessive compared to the nature and severity of its misconduct.[51]

The punitive damage award against Appellant manifestly serves, and in turn is justified by, the historic purposes of punitive damages in civil cases to punish the wrongdoer and to deter that party and others from engaging in the same conduct in the future. Especially when the defendant has substantial economic resources, the award must be sufficiently large to have the desired admonitory and behavioral impact.[52] Appellant is a nation-

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[51] Even if a comparison of punitive and actual damages was relevant, the appropriate measure of Appellees' actual damages would be the injury caused by Appellant's tortious conduct, not its liability on the contract claim. However, Appellant has not even attempted to estimate the harm inflicted upon Appellees in the form of humiliation, emotional stress, aggravation, and financial insecurity, much less demonstrated that the punitive damages award is excessive when compared to the monetary judgment necessary to compensate these injuries adequately.

[52] *See* W. Shernoff, S. Gage & H. Levine, *Insurance Bad Faith Litigation* § 8.06[2] at 8-20 (1984) ("'the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective'") (*quoting* Bertero v. National General Corp., 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608, 724 (1974)).

wide insurance company which possesses tremendous economic leverage over the persons it insures, many of whom lack the resources, sophistication and endurance to contest or even detect unlawful claim denials. These parties often, as here, have no role in selecting their insurance company or in negotiating the terms of the policy. The insurance company's already enormous leverage is only enhanced when its employees lie to insureds regarding the consideration afforded their claim while knowingly failing to process that claim in compliance with the company's own procedures, perhaps the only significant protection must insureds have against arbitrary and peremptory treatment by claim examiners. An award of $3.5 million represents a reasonable estimate by the jury of the amount of punitive damages necessary to punish Appellant and to deter insurance companies from using their immense resources and economic leverage to engage in this type of gross misconduct against a vulnerable class of insureds.

A punitive damage award of this size is particularly appropriate when an organization engages in intentional misconduct with respect to a situation it routinely encounters in large numbers on a day-to-day basis due to the inherent danger and likely possibility that this misconduct is more widespread. In this case, it strains credulity to suppose that the knowing misrepresentations and failure to adhere to basic company procedures perpetrated over an extended period of time by numerous decision-making personnel constitute aberrant behavior limited solely to Appellees' claims. Moreover, the remark by claim examiner Hutton at Appellant's Home Office—that he might reconsider his decision to deny the claim if it appeared the Lavoies were likely to file suit—plainly reveals a predisposition for according adverse, discriminatory treatment to the claims of insureds over whom Appellant undoubtedly has the greatest leverage. A substantial punitive damage award mitigates the financial incentive which an insurance company undeniably has to engage in unreasonable claims practices for the large num-

ber of small claims it processes daily. *See Insurance Bad Faith Litigation* § 8.06[5] at 8-23.

Punitive damages also provide a necessary incentive for private parties to institute lawsuits to recover unlawfully denied claims when, as here, the amount in dispute appears to be substantially less than the costs and legal fees required to prosecute the litigation. This purpose of punitive damages is of ancient vintage, *e.g.*, C. McCormick, *Law of Damages* § 77 at 276-77 (1935), and mitigates the harsh effects of the American Rule under which successful litigants are required to bear their own litigation expenses. It applies with special force to this case in light of Appellant's prolonged civil litigation, involving fabricated testimony by Appellant's personnel to cover up their misconduct, over a modest claim which Appellant knew had been unlawfully denied on four separate occasions and the recovery upon which would not cover plaintiffs' costs and legal fees. Without the specter of substantial punitive damages for intentional misconduct, Appellant and other insurance companies will be free to deny many valid insurance claims with virtual impunity.[53]

Punitive damages also serve as compensation for plaintiffs' injuries. In *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981), the Supreme Court of Alabama specifically recognized that punitive damages for an insurance company's bad faith failure to pay a legally-owed claim "may include mental distress and economic loss." Here, Appellees did not receive any damages specifically designated as compensation for the humiliation, emotional strain, aggravation, and financial insecurity caused by Appellant's gross misconduct, thus

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[53] Appellant's suggestion that double or triple damages are an adequate penalty, Br. at 45, cannot be taken seriously. For a nationwide insurance company such as Appellant, the risk of occasional double or triple recoveries for small claims, such as Appellees' claim for $1,650.22, is precisely the type of liability exposure it is willing to accept without changing its deficient claims practices in any respect. *See Walker v. Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488, 179 N.E.2d 497, 499 (1961).

making it likely that a substantial portion of the $3.5 million judgment represents compensation for these injuries. The dual compensatory and punitive aspects of Appellees' judgment only confirm the absence of any grounds for finding this award to be excessive.

Appellees' punitive damage award was reviewed, and upheld as not excessive, by the trial judge who heard the evidence and by the Supreme Court of Alabama. As a civil judgment, this award does not represent a liability unusually large in amount under modern standards, nor will it be financially oppressive for Appellant to pay. The award has been set at an amount which plainly serves the purposes of punitive damages to punish the defendant, deter future wrongdoing, compensate plaintiffs for actual injuries, and provide an incentive for parties to contest insurance companies' intentional misconduct. Appellant has suggested no criteria by which to measure putatively excessive awards other than the standard already employed by the Alabama courts, nor has it advanced any legitimate reason for this Court to oust state courts from their traditional role as the sole judicial bodies with responsibility for reviewing the alleged excessiveness of jury punitive damage awards in state cases.

VI. PUNITIVE DAMAGES WERE NOT ASSESSED AGAINST APPELLANT IN VIOLATION OF DUE PROCESS

At bottom, Appellant's undifferentiated attack on punitive damages, purportedly on due process grounds, Br. at 46-49, is little more than an attempt to transform this appeal into a general forum for debating the merits of punitive damages. This attempt must fail, as similar efforts have in the past, on the basis of a uniform line of precedent upholding in principle the lawfulness of punitive damage awards.[54] In *Day v. Woodworth*, 54 U.S. at

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[54] Various *amici* seek to have this Court address the "social and policy ramifications" of punitive damage awards by civil juries, *e.g.*, Brief of Southeastern Legal Foundation, Inc. at 5, which are asserted to be excessive in both number and amount. What these

371, the Court upheld a punitive damage assessment, stating

> "[w]e are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

In *The Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 492, 493 (1876), the Court reiterated that "the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be recovered," and that the practice of awarding punitive damages "has received the sanction of this court." These cases, and numerous others like them,[55] unambiguously repudiate Ap-

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parties recognize only cursorily, or fail to acknowledge at all, is that punitive damage awards by civil juries often have been eliminated or substantially reduced as excessive by state and federal courts employing the same traditional standards of review which Appellant attacks here. Indeed, in *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d at 926, the Supreme Court of Alabama reduced from $1.1 million to $100,000 an award against an insurance company found liable under the bad faith tort when the circumstances of that case showed the award to be excessive. Moreover, *amici's* call for more stringent controls on civil penalties raises complex factual and policy issues over a broad range of substantive areas which are properly the concern of state legislatures or Congress, not this Court. While Appellant and *amici* repeatedly seek to invoke the Due Process Clause to aid their cause, it would fundamentally violate Appellees' due process rights to have their case decided not on its own merits and facts, but by reference to statistical or tabular compilations of selected cases in other jurisdictions involving other areas of law which may or may not have involved unjustified punitive damage awards.

[55] A plurality of the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967), stated that "the Constitution presents no general bar to the assessment of punitive damages in a civil case." The Court later recognized that "[p]unitive damages are 'a particular remedial mechanism normally available in the federal courts'" in *Carlson v. Green*, 446 U.S. 14, 22 (1980) (*quoting* Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971)). In *Smith v. Wade*, 461 U.S. 30, 35 (1983), the Court reaffirmed the availability of punitive damage awards under 42

pellant's contention that punitive damage awards violate due process.

Appellant (Br. at 48) nevertheless maintains that its due process rights have been infringed by the Supreme Court of Alabama's purported failure to promulgate "any articulated substantive rule of conduct." However, it is well established that a civil rule of law affecting no fundamental right can be held invalid for vagueness under the Due Process Clause only in those rare cases where it exacts "obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). The defendant-favoring legal and evidentiary rules adopted by the Supreme Court of Alabama to govern this cause of action, and its use of punitive damage standards traditionally employed by both federal and state courts to measure and review plaintiffs' awards,[56] cannot under any responsible interpretation be regarded as the complete absence of substantive rules or standards.[57] To hold otherwise would lead to a

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U.S.C. § 1983, holding that the validity of punitive damages is "accepted as settled law by nearly all state and federal courts, including this Court." The Court recently upheld a state's authority to impose punitive damages in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), recognizing that "[p]unitive damages have long been a part of traditional state tort law."

[56] These standards are set forth in the Supreme Court of Alabama's numerous decisions construing the bad faith tort. *See, e.g.*, National Sec. Fire & Cas. Co. v. Bowen, 417 So. 2d 179, 183 (Ala. 1982); National Savings Life Ins. Co. v. Dutton, 419 So. 2d at 1362. Since the *Chavers* decision in 1981, the Supreme Court of Alabama has considered more than 30 cases involving the bad faith tort. Including the case at bar, bad faith actually was found in only four cases.

[57] If Appellant's complaint is that Alabama's punitive damage doctrine does not remove all possibility of an erroneous judgment, this complaint must be denied under the well established rule that "the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as

drastic and absurd result by literally eviscerating state tort law and numerous federal statutory provisions utilizing similar standards.[58]

Appellant also challenges the award under the Due Process Clause by claiming that it did not have fair notice that liability could result from the manner in which it processed the Lavoies' claim. Br. at 48.[59] What Appellant ignores, of course, is that the tort of bad faith failure to pay a legally-owed insurance claim is merely a "species of fraud," *Dumas v. Southern Guaranty Insurance Co.*, 408 So. 2d at 89, and that fraud traditonally has been the grounds for compensatory and punitive damages in Alabama, *e.g.*, *Old Southern Life Insurance Co. v. Woodall*, 295 Ala. 235, 326 So. 2d 726, 732 (1976). Appellant cannot seriously contend that it reasonably and

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to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations." Mackey v. Montrym, 443 U.S. 1, 13 (1979).

[58] *See* Martinez v. California, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"); Green v. State Farm Fire And Cas. Co., 667 F.2d 22, 24 (9th Cir. 1982) (dismissing due process claim against punitive damage award as "border[ing] upon the frivolous").

[59] Appellant's additional argument (Br. at 49) that punitive damages advance "no legitimate state interest" is absurd on its face. As demonstrated at pp. 39-43 *supra*, Appellees' award serves several important state interests. The futility of Appellant's due process claim is further illustrated by its shrill rejection of the proposition that "the retrospective application of new rules to historic conduct could have any deterrent effect." Br. at 47. What Appellant views as "plainly irrational," *id.*, could hardly be more self-evident. The punitive damages assessed against Appellant for its gross misconduct will serve as an undeniable warning for Appellant and other insurance companies not to engage in this type of outrageous behavior in the future. Indeed, it is self-contradictory for Appellant to complain about the chilling effect of this punitive damage award, Br. at 48, while claiming that the award does not act as a deterrent.

legitimately believed that the Due Process Clause gave it a license until 1981 to injure its insureds through intentional misconduct—involving knowing misrepresentations, repeated and knowing failures to follow its own procedures, and knowingly false testimony under oath as part of a cover-up attempt—without being subject to liability therefor. It has been established in Alabama for at least three decades that insurance companies owe a legal duty of good faith and fair dealing to their insureds.[60] Appellant cannot have been unaware of this duty, nor can it seriously contend that it believed its outrageous treatment of Appellees even minimally comported with it.

Appellant also could not have been unaware of the development of the bad faith tort in other states in the early 1970's, and the resulting potential for this tort to be recognized in Alabama, as it ultimately was in 1981.[61] This process, by which a common law cause of action first germinates in one or more states and then gains a nationwide scope through formal adoption on a state-by-state basis, is not unlike the deliberative process which precedes enactment of federal legislation. Just as parties have been found to possess "ample advance notice" of federal legislation applied retroactively to cover the time period during which it was under discussion before Congress, *see United States v. Darusmont*, 449 U.S. 292, 299 (1981) (per curiam), so Appellant had sufficient notice

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[60] *See* Waters v. American Cas. Co., 261 Ala. 252, 73 So. 2d 524 (1953) (per curiam) (recognizing tort for insurance company's failure to satisfy its legal duty of good faith and fair dealing in third party context). This obligation has its origins in the "implied in law duty of good faith and fair dealing" which has been recognized at least since 1939 as inherent in every contract. *See* Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d at 6.

[61] California was the first state to recognize this tort. *See* Fletcher v. Western Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970). Other states followed California's lead soon after. *See, e.g.*, Amsden v. Grinnell Mut. Reins. Co., 203 N.W.2d 252 (Iowa 1972); Campbell v. Government Employees Ins. Co., 306 So. 2d 525 (Fla. 1974); Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703 (1976).

that its misconduct could result in tort liability.[62] Appellant should not be permitted to take advantage of the interval between this tort's initial emergence and its subsequent adoption in Alabama by engaging in deliberate misconduct up until the moment of formal recognition. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709, 2719 (1984).

Appellant itself was a defendant in *Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973), one of the earliest cases recognizing the tort. In response to *Gruenberg* and similar cases, a plethora of law review, insurance journal, and magazine articles brought national attention to this emerging tort,[63] often with constructive recommendations for claims practices by which insurance companies could minimize their liability exposure. Some of these articles advised Appellant and other insurance companies that liability could be avoided without undue effort simply by conducting a thorough investigation before acting upon the claim, resolving legitimate doubts in favor of the insured, avoiding deceptive practices, and paying lawful claims promptly.[64] Had Appellant followed these simple guide-

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[62] Nor can Appellant reasonably claim that it processed Appellees' claim in reliance upon a rule of law stating that it could not be held liable in tort for bad faith. In *Childs v. Mississippi Valley Title Ins. Co.*, 359 So. 2d 1146, 1152 (Ala. 1978), the Supreme Court of Alabama specifically recognized that it had never at any time in the past "rejected first party bad faith tort actions against an insurer." In *Vincent v. Blue Cross-Blue Shield of Alabama, Inc.*, 373 So. 2d 1054, 1056 (Ala. 1979), the court again emphasized that up to that point it had neither recognized nor rejected the bad faith tort. Both of these decisions were issued before this case went to trial and before much of Appellant's egregious misconduct occurred.

[63] Many of these articles are collected in Levine, *Demonstrating and Preserving The Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 620 n.52 (1979).

[64] *See, e.g.*, Houser & Knoll, *Claim Handling and Bad Faith Claims—The Hazards of Saying "No,"* 15 For the Defense 93 (1974); Raymont, *Punitive Damages In Property Insurance Claims,*

lines here, it would not have been held liable for punitive damages.

The tort of an insurance company's bad faith failure to pay a claim has developed in Alabama according to the traditional case-by-case adjudication of the common law. The Court has never declared this common law technique to be in any way antithetical to the Due Process Clause. To the contrary, the Court in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), implicitly upheld the lawfulness of the common law method. There the Court recognized that when a state statute imposes a legal duty without explicitly creating a liability, a remedy at common law may lawfully be imposed by state courts in the first instance. *Id.* at 312 n.8. By establishing a remedy at common law for an insurance company's tortious misconduct in violation of its pre-existing legal duty of good faith and fair dealing toward its insureds, the Supreme Court of Alabama engaged in the same common law function practiced in the United States for over two centuries which was accepted by this Court in *Donaldson*.[65] For this reason and the reasons stated above, Appellant has failed to meet its heavy burden of proof to demonstrate that the rule's impact is manifestly "harsh and oppressive" in violation of the Due Process Clause. *Welch v. Henry*, 305 U.S. 134, 147 (1938).[66]

Best's Rev. (Prop./Liab.), July 1975, at 30; Wier, *Liability Exposures in Tort Growing Out of Breach of Insurance Contracts*, Best's Rev. (Prop./Liab.), Oct. 1975, at 32.

[65] In addition, Appellant operates in a highly regulated field with unique public interest considerations. *See, e.g.*, German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 414 (1914). Given the nature of its business, Appellant can hardly object to judicial action which refines the extensive regulatory regime to which it already is subject. *See* FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958); Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940).

[66] Appellant also relies upon dictum in *Usery v. Turner Elkhorn Min. Co.*, 428 U.S. 1, 17 (1976), that laws which seek to deter normally should not be applied retrospectively. Br. at 49. This statement cannot apply to Appellees' award, which serves legiti-

Incredibly, Appellant claims that this Court should review punitive damage awards under the Due Process Clause to prevent unnecessary litigation and the chilling of desirable conduct. Br. at 48. The only unnecessary litigation on the horizon is this appeal and the flood of similar appeals which inevitably will engulf this Court if punitive damage awards are for the first time subjected to review on the merits under the Due Process Clause. Moreover, it cannot seriously be contended that the intentional mistreatment of insureds which will be deterred by this award qualifies as desirable conduct. This Court has been concerned about the chilling effect of punitive damage awards only in the context of First Amendment activities, *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2944 (1985), or the proper functioning of government officials, *see Smith v. Wade*, 461 U.S. at 88 (Rehnquist, J., dissenting). Appellant fails to qualify on either score.

CONCLUSION

The record shows that Appellant engaged in egregious misconduct towards its own insureds and then fomented efforts to cover up its errors. Failing that, in a desperate attempt to avoid liability, it belatedly concocted a series of constitutional claims, including an attack on the integrity of the Supreme Court of Alabama. For the reasons discussed above, these efforts come too late, and this case should be dismissed. In any event, neither Appellant's procedural nor substantive rights were violated by the decision on appeal and, if the Court should consider the merits, the judgment of the Supreme Court of Alabama should be affirmed.

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mate public purposes beyond punishment and deterrence. *See supra* pp. 39-43. Moreover, the Court in *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 104 S. Ct. at 2718, held that a retrospective measure will be upheld if it promotes a "legitimate legislative purpose" by "rational means." Appellees' award is valid under this standard as an effective mechanism for detecting, preventing and redressing abuses in the claims practices of insurance companies.

Respectfully submitted,

JACK N. GOODMAN *
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

September 27, 1985

APPENDIX

APPENDIX

IN THE CIRCUIT COURT
FOR THE TENTH JUDICAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

Civil Action No. CV 84-500-447-JDC

T. ERIC EMBRY,
Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,
Defendant.

[Filed April 16, 1985]

ORDER OF DISMISSAL

Upon consideration of the Stipulation for Dismissal of the parties hereto dated April 11, 1985, and for good cause shown:

It is hereby ORDERED, ADJUDGED and DECREED by the Court that dismissal of this action pursuant to and in accordance with said Stipulation for Dismissal be and the same hereby is approved and that, accordingly, this action be, and the same is hereby, dismissed with prejudice, the parties to bear their own costs.

DONE and ORDERED this the 16 day of April, 1985.

/s/ Jack D. Carl
Circuit Judge

IN THE CIRCUIT COURT
FOR THE TENTH JUDICAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
EQUITY DIVISION

Civil Action No. CV 84-500-447-JDC

T. ERIC EMBRY,
Plaintiff, on behalf of himself and all other persons who are members of the Alabama State Employees Health Insurance Plan carrying medical and hospitalization insurance through Blue Cross-Blue Shield of Alabama, Group Number 13000,

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA,
Defendant.

[Filed April 16, 1985]

STIPULATION FOR DISMISSAL

Come now the plaintiff, T. Eric Embry, and the defendant, Blue Cross and Blue Shield of Alabama ("Blue Cross"), and, pursuant to Rule 41(a)(1) of the Alabama Rules of Civil Procedure, hereby stipulated that this action be dismissed with prejudice with the approval and order of the Court. The circumstances and reasons therefor are as follows:

1. The primary object of the institution of this suit by the plaintiff, T. Eric Embry, was to emphasize to defendant Blue Cross the importance to individual members covered under the Alabama State Employees' Health Insurance Plan ("Plan") that claims under the Plan be processed and determined by Blue Cross in a timely and efficient manner. Blue Cross recognizes that some problems have occurred in the past and is determined to minimize them in the future.

2. The institution and prosecution of the suit by the plaintiff have resulted in Blue Cross' increased awareness of the need for and intensified commitment to exert efforts toward timely and efficient processing of claims.

3. Blue Cross accordingly affirms its resolve to process diligently the payable claims of covered members in accordance with the terms of the Plan, including the "Performance Standard for the Administrator" contained in the Administrative Services Agreement between Blue Cross and the Alabama State Employees' Insurance Board. Blue Cross will intensify efforts in the future in this regard.

4. It is recognized that in order to properly process and determine claims in accordance with the terms of the Plan, it often is necessary for Blue Cross to obtain from other sources information not contained on the claim forms received from the members or their health care providers. In an effort to expedite the processing of claims Blue Cross will undertake reasonable efforts to locate and obtain such information from the internal sources of Blue Cross before such information is sought from external sources.

5. It also is recognized and acknowledged that under the statutory laws of Alabama the ultimate responsibility for, and control of, the terms and manner of administration of the Plan are vested in the Alabama State Employees' Insurance Board and its Director. Therefore, nothing herein is intended to usurp or conflict in any way with the power and authority of the Board and its Director with respect to the processing and payment of claims, or any other terms, under the present or any future contractual arrangements between the Board and Blue Cross.

WHEREFORE, the primary purpose of this suit being accomplished by the resolve of Blue Cross as stated above, therefore in accordance with and pursuant to the foregoing each party, as evidenced by the signatures below of their respective counsel of record, stipulates

and agrees that this action be dismissed with prejudice, subject to the approval and by order of the Court.

This the 12 day of April, 1985.

T. ERIC EMBRY

By: W. E. Rutledge
W. EUGENE RUTLEDGE
As His Attorney

BLUE CROSS AND BLUE SHIELD OF ALABAMA

By: William G. Somerville, Jr.
WILLIAM G. SOMERVILLE, JR.
As Its Attorney

CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT OF ALABAMA
IN EQUITY

THE STATE OF ALABAMA
JEFFERSON COUNTY

I, the undersigned, as Register of the Circuit Court, Tenth Judicial Circuit of Alabama, do hereby certify that the foregoing contains a full, true and correct copy of the instrument herewith set out as appears of record in said Court.

Witness my hand and seal of said Court, this the 29th day of August, 1985.

/s/ Douglas L. Cockrell
Register

By: C. Houtz
Deputy Register

Supreme Court, U.S.
FILED
NOV 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal From The Supreme Court Of Alabama

REPLY BRIEF OF APPELLANT

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*THEODORE B. OLSON
JOHN J. SWENSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Conn. Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Appellant

*Counsel of Record

Of Counsel:

PETER V. SINTZ
WM. M. CUNNINGHAM, JR.
SINTZ, CAMPBELL, DUKE, TAYLOR & CUNNINGHAM
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Seery, "Types of Health Risk Bearers," in *Group Insurance Handbook* (R. Eilers & R. Crowe eds. 1965) 18

A. Enthoven, *Health Plan: The Only Practical Solution to the Soaring Cost of Medical Care* (1980) .. 18

Moody's Bank & Finance Manual (1973) 19

REPLY BRIEF OF APPELLANT

I

JURISDICTION

Appellees present a series of largely unrelated objections to this Court's jurisdiction which, for the most part, reflect inaccurate characterizations of actual Alabama practice regarding the presentation of federal constitutional questions or a misunderstanding of the applicable federal rules formulated by this Court. Their specific objections will be addressed below as warranted. There is, however, a well established practice of the Supreme Court of Alabama which, standing alone, defeats all of appellees' arguments that appellant did not comply with Alabama practice as regards the presentation of its federal questions. That court regularly entertains and resolves on the merits questions presented for the first time on rehearing.

The cornerstone of appellees' argument, Br., at 10, is that "the Alabama courts do not permit new questions to be presented on rehearing." In support of this proposition, appellees cite one case in this Court, *Exxon Corp.* v. *Eagerton*,[1] and three cases in the court below. In one of those

[1] 462 U.S. 176 (1983). In the *Exxon* case, this Court declined to reach the question whether the Alabama statute at issue was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.* (1976 ed. and Supp. V) ("EPAA"). In doing so, the Court observed that the "general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." 462 U.S., at 181 n.3. This observation, however, was made without any briefing of this issue by any of the parties before the Court. Appellant has now brought to the attention of this Court in its Jurisdictional Statement, Reply Memorandum, Brief and this Reply Brief, more than thirty-five cases in the court below in which issues raised for the first time on rehearing have been decided on the merits.

Appellant's point is not academic. For example, one of the cases relied upon in footnote 3 of *Exxon* was *Burton* v. *Burton*, 379 So.2d 617, 618

latter three cases, the court below, after reciting that it could not "sanction the practice of bringing up new questions for the first time in application for rehearing," went on to reach and decide the very question it disclaimed authority to decide. *Kirkland* v. *Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967). In another, although the intermediate appellate court had refused to decide a question because it had been raised for the first time in an application for rehearing, the court below, after noting that fact, reached and decided that question without disturbing the holding of the intermediate appellate court that presentation of that question in an application for rehearing had been untimely. *Lovett* v. *Uptain*, 450 So.2d 113, 116 (Ala.

(Ala. Civ. App. 1980), in which, because it had not been raised in a timely fashion, the Court of Civil Appeals refused to decide an equal protection challenge similar to that decided by this Court in *Orr* v. *Orr*, 440 U.S. 268 (1979). That same court had previously refused to entertain a similar challenge for the same reason in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), and the Supreme Court of Alabama dismissed a petition for a writ of certiorari. *Hughes* v. *Hughes*, 362 So.2d 918 (Ala. 1978). Notwithstanding these actions by the Alabama courts, which were brought to the attention of this Court by the appellee in *Hughes*, Motion to Dismiss or Affirm, at 2, this Court took jurisdiction over the appeal in *Hughes* and vacated the judgment of the court below. *Hughes* v. *Hughes*, 441 U.S. 901 (1979). The *Exxon* Court's citation to *Burton* cannot be reconciled with the Court's action in *Hughes* any more than its assumption in *Exxon* regarding the general practice of the Alabama courts can be reconciled with the many cases now brought to the Court's attention by appellant. The Court's action in *Exxon* can, however, be explained by reference to the suggestion by the Solicitor General in *Exxon* that because the issue of preemption under the EPAA had not been raised in the trial court, the record before the Court was factually deficient for purposes of deciding that preemption issue. Br. for the United States and the Federal Energy Regulatory Commission as Amici Curiae Supporting Reversal, at 12 n.10. There is no such deficiency here.

The other two cases in the court below relied upon in footnote 3 of *Exxon*, *State* v. *Newberry*, 336 So.2d 181, 183 (Ala. 1976), and *State* v. *Graf*, 280 Ala. 71, 72, 189 So.2d 912, 913 (1966), do not pronounce a rule of general applicability, but, rather, apply a distinct rule under which the State, in condemnation proceedings, is precluded from raising certain issues on appeal if it has not challenged the damages awarded for the particular taking involved.

Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984). The third case, *Stover* v. *Alabama Farm Bureau Insurance Co.*, 467 So.2d 251, 253 (Ala. 1985), also appears to be contrary to appellees' position because the holding in *Stover* is based on the Supreme Court of Alabama's "failure to address" an issue raised for the first time on rehearing during a prior appeal of the case rather than a lack of power to do so on that initial rehearing.

Appellant has previously pointed out that other cases relied upon by appellees in this Court, Motion to Dismiss, at 7, such as *King* v. *Reid*, 428 So.2d 611 (Ala. 1983), and *Ex parte Hanna*, 267 Ala. 527, 103 So.2d 720 (1958), are cases in which the court below, after suggesting it could not do so because of late presentation, reached the merits of a question. Similar cases in which the court below has decided constitutional and non-constitutional issues raised for the first time on rehearing are legion.[2]

These cases are also instructive on another relevant aspect of Alabama practice. When the court below has reached the merits and decided them against an applicant on rehearing, it generally has "overruled" the application, as in the case at bar. When, however, an applicant has failed to comply with any explicit rules governing applications for rehearing, the court below has generally either "stricken," "denied" or "dismissed" the application. For

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[2] *Louisville & Nashville Ry. Co.* v. *Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916); *Dunn* v. *Dean*, 196 Ala. 486, 71 So. 709 (1916); *Copeland* v. *Pope*, 198 Ala. 257, 73 So. 490 (1916); *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co.* v. *Imperial Laundry Co.*, 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co.* v. *State*, 236 Ala. 489, 183 So. 650 (1938); *Huie* v. *Smith*, 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans* v. *Williams*, 237 Ala. 318, 186 So. 689 (1939); *Dodson* v. *Beaird*, 237 Ala. 587, 187 So. 862 (1939); *Sisson* v. *Swift*, 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame* v. *Dawson*, 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph* v. *Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948); *Howell* v. *Roueche*, 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp.* v. *Mayo*, 286 Ala. 675, 245 So.2d 819 (1971).

example, in *Thompson* v. *State*, 268 Ala. 483, 489, 107 So.2d 890, 895 (1959), both parties filed applications for rehearing; one of the applications was "stricken" as untimely without reaching the merits, while the merits of the other application were decided against the applicant and the application was "overruled." The use of the terms stricken, dismissed or denied to indicate procedural defects in applications for rehearing appears to be a consistent practice. *See, e.g., Hamm* v. *Harrigan*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966). If the court below believed that Questions 1, 3 and 4 had not been raised in a timely fashion, it certainly knew how to indicate that belief.

A. The Appellate Question

Appellees, Br., at 11, argue that the unbroken line of seventeen cases dating from 1861 in which the court below has entertained constitutional and statutory questions regarding § 12-22-72 raised for the first time on rehearing or other comparable post-judgment motions, *see* Br. of Appellant, at 12, and Juris. Stat., at 12-13 n.5, do not establish the relevant state practice regarding appellant's presentation of this question. Appellees, however, do not cite a single case in the court below which remotely suggests any basis upon which to distinguish any of those seventeen cases from this case.[3] And, as demonstrated by the fourteen cases cited in note 2, *supra*, and cases expressly relied upon by appellees (*Kirkland, Lovett, King* and *Hanna*), the practice of the court below in deciding questions regarding § 12-22-72 on rehearing is paralleled by that court's practice of deciding other questions—including federal constitutional

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[3] The fact that the court below has entertained questions regarding § 12-22-72 prior to rehearing, Br. of Appellees, at 11, is of no assistance to appellees. *Cf. NAACP* v. *Alabama*, 357 U.S. 449, 457 (1958) (presentation of federal question by way of certiorari rather than mandamus held sufficient to sustain this Court's jurisdiction because prior state cases do not suggest that mandamus, although available, is *exclusive* remedy).

questions—raised for the first time on rehearing or in other post-judgment proceedings.[4]

B. The Disqualification Question

Appellees' argument, Br., at 12, that the presentation of the issue concerning Justice Embry to the court below—one week after appellant discovered the relevant facts—was somehow untimely is patently frivolous and is, in any event, irrelevant given the disposition of appellant's challenge by each of the Justices below on an individual basis. Appellant documented its diligence in raising this issue in the court below in five sworn affidavits and one exhibit, *see*

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[4] Appellees acknowledge, as they must, that appellant's brief in support of its Application for Rehearing was timely filed on December 28, 1984, but argue, Br., at 10, that appellant did not comply with Alabama procedure because the constitutional issues were not identified in appellant's Application for Rehearing. Appellees' argument rests on the assumption—unsupported by citation to any Alabama rule or case—that, contrary to the clear import of Rule 20, Ala. R. App. P., issues are to be presented in a document captioned "Application for Rehearing." Appellees' argument would, apparently, seek to reinstate in Alabama practice the requirement that issues presented to appellate courts be identified in "assignments of error," a practice squarely rejected in the adoption of Rule 20, Ala. R. App. P. *See* App. 1a, *infra*.

Appellees' suggestion, Br., at 10 n.3, that Rule 40, Ala. R. App. P., requires a brief filed in support of an application for rehearing to "hew[ ] to that application" finds absolutely no support either in the plain language of that Rule—which nowhere suggests that the application itself need be anything more than a piece of paper requesting a rehearing—or any case construing Rule 40.

Appellees' confusion regarding Alabama practice is also reflected in their citation, Br., at 10 n.4, to § 6-6-27, *Code of Alabama* (1975), for the proposition that appellant failed to serve some unidentified "pleading" on the Attorney General of Alabama. Section 6-6-27 does not, so far as appellant has been able to determine, exist. In any event, the Attorney General was served with appellant's brief in full compliance with the only applicable rule, Rule 44, Ala. R. App. P., and has been served as required by the Rules of this Court. For the convenience of the Court, Rules 20, 40 & 44, Ala. R. App. P. and the Committee Comments thereon, are reprinted in the Appendix to this Reply Brief, *infra*.

Juris. Stat. at 8-10, Reply Mem., at 3 & n.2; J.S. App. 105a-107a, 130a-131a, 137a-144a.[5] Appellees' argument, Br., at 12, made without citation of authority, that "Since these pleadings were filed wholly outside the scope of the Alabama rules, the Alabama court was under no duty to consider Appellant's request at all . . . ," is disingenuous. No Alabama rule of appellate procedure even provides for challenging the qualifications of a Justice of the Supreme Court of Alabama. Nothing in the orders and opinion issued by the court below or the concurring opinions of the individual Justices suggests that that court regarded appellant's challenge as untimely in any sense.

C. The Contract Clause and Excessive Fines Clause Questions

Apparently relying on cases such as *Kirkland* v. *Kirkland* and *Lovett* v. *Uptain*, and without citation to any relevant rule,[6] appellees contend, Br., at 13, that the presentation of these questions "was certainly not within any construction of proper procedure in Alabama." Appellant has now brought to this Court's attention more than thirty-five cases establishing what the practice of the court below *is*. These

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[5] These documents refute appellees' inexplicable statement, Br., at 12, that "[a]ppellant did not attempt to explain why it could not have discovered the relevant facts" related to the disqualification issue at some earlier date. Appellees' unstated premise is that litigants in the Alabama courts must constantly monitor the filings in all trial courts in Alabama in order to discover whether a judge in their case is a party in another case involving similar issues. Surely litigants in Alabama (and all States) have a right to the minimal expectation that jurists will not attempt to adjudicate claims while pursuing and advocating the same types of claims on behalf of themselves and others without disclosing the existence of such a peculiar dual vocation.

[6] Appellees' citation, Br., at 13 n.9, to Rule 40, Ala. R. App. P., as being relevant to the raising of the Contract Clause question is puzzling. Appellant has acknowledged from the very outset, Juris. Stat., at 13, that the Contract Clause had not been *cited* to the court below until February 21, 1985. Appellant has argued that the Contract Clause question was nothing more than an enlargement of a question presented to the court below in its brief filed December 28, 1984. Appellant stands on that argument.

cases and, remarkably, the very cases of the court below relied upon by appellees as discussed above, establish that this Court may address all of the Questions Presented without undermining any Alabama rule or practice. Appellees have not, and cannot, establish any practice in the court below that has been so "strictly or regularly followed" as to bring this case outside the rule laid down by this Court in *Barr* v. *City of Columbia,* 378 U.S. 146, 149 (1964). Indeed, the Alabama cases relied upon by appellant are, if anything, more persuasive on the points at issue than were the cases of the court below relied upon by this Court in *NAACP* v. *Alabama,* 377 U.S. 288, 297-301 (1964), in rejecting a square holding by the court below that the federal question brought here had not been presented in conformity with Alabama practice.

II

THE UNCONSTITUTIONALITY OF § 12-22-72

Appellees' defense of § 12-22-72 proceeds by ignoring the special solicitude this Court has historically shown towards preserving equal access to appellate courts, *Lindsey* v. *Normet,* 405 U.S. 56, 77 (1972), and by failing to grapple with the fact that § 12-22-72 is entirely superfluous to an existing, comprehensive and even-handed system for dealing with the state interests purportedly vindicated by § 12-22-72. Striking down the appeal penalty will leave the Alabama courts fully able to deal with frivolous or dilatory appeals and will leave litigants fully protected by post-judgment interest.

No suggestion has been made, and none could be, that appellant's appeal below was either dilatory or frivolous. Thus, in this case the statute manifestly does not serve the purpose of controlling such appeals. However, even if it had, costs and damages could have been assessed against appellant after a judicial determination had been made pursuant to Rule 38, Ala. R. App. P. That rule, of course, penalizes *only* litigants who take frivolous or dilatory ap-

peals and draws no arbitrary and irrational distinctions among plaintiff-appellants and defendant-appellants; it is, therefore, unobjectionable.

Appellees unaccountably ignore altogether the fact that Alabama already provides for interest to be assessed on any money judgment, presently at the rate of twelve percent per annum, thereby fully protecting the interests of a party who secures a money judgment at trial, Rule 37, Ala. R. App. P.; § 8-8-10, *Code of Alabama* (1975), and removes any "incentive to delay payment by filing an appeal, regardless of its merits." Br. of Appellees, at 16.

Bereft of any plausible basis on which to argue that § 12-22-72 is rational on its face or as applied to appellant, appellees fall back on the argument that the ten percent penalty is rational because it imposes "additional damages." Br., at 15, *quoting City of Birmingham* v. *Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 186 (1950). But as appellant has pointed out, Br., at 21, under *Lindsey* v. *Normet,* a state may only impose burdens on the right of access to appellate courts which are both "reasonably tailored" to serve identifiable interests not already served by other statutes and rules and are uniformly and indiscriminately applied. 405 U.S., at 78.[7] Section 12-22-72 is indefensible on both counts.

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[7] Appellees' reliance, Br., at 16-17, on this Court's decision in *Louisville & Nashville Ry. Co.* v. *Stewart,* 241 U.S. 261 (1916), in defense of § 12-22-72 is misplaced. The opinion in that case does not refer to the Equal Protection Clause at all, and an examination of the briefs submitted to this Court establishes that this Court was presented with and presumptively decided, at most, the question whether the state appeal penalty challenged in that case was preempted by federal statutory law. *See* Br. of Louisville & Nashville Ry. Co. as plaintiff in error, at 10-12; Br. of Stewart as defendant in error, at 35-38.

Likewise, appellees' suggestion, Br., at 17, that statutes enacted by Arizona, Georgia, Oregon and additional unidentified states (other than Mississippi and Virginia) somehow support their position is misleading. Under appellant's submission, the Arizona, Georgia and Oregon statutes cited by appellees would be defensible because the imposition of penalties under them is discretionary and based upon judicial determinations that imposi-

III

THE DISQUALIFICATION QUESTION

The centerpiece of appellees' defense of the conduct of Justice Embry is based on their extraordinary assertions, Br., at 19, 22-24, that a self-serving recital in a Stipulation for Dismissal ("Stipulation"), filed in Justice Embry's class action suit against Blue Cross somehow retroactively cleansed the record of the effects of his prior conduct. In the Stipulation, Justice Embry's attorney declares on his behalf that the "primary objective" of his class action was not to recover the damages which he sought on behalf of himself and other Alabama public employees, but to require Blue Cross to process claims in a "timely and efficient manner." From this statement, appellees draw the conclusion and make the representation to this Court that Justice Embry's "suit was dismissed . . . without payment

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tion is warranted because an appeal has been found to be frivolous. *Cooper* v. *Cooper*, 130 Ariz. 257, 261, 635 P.2d 850, 854 (1984); *Prattes* v. *Southeast Ceramics, Inc.*, 132 Ga. App. 584, 208 S.E.2d 600 (1974); *Stirling* v. *Dari-Delite, Inc.*, 494 P.2d 252 (Ore. 1972) (supplemental decision), 498 P.2d 753 (Ore. 1972) (on motion to recall mandate). The Virginia statute cited by appellees, § 16.1-113, *Code of Virginia* (1985 Cum. Supp.), would appear to impose a penalty similar to additional interest, "ten percent annually," for "the purpose of discouraging appeals with little or no basis in law or fact from courts not of record." *Nationwide Mutual Ins. Co.* v. *Tuttle*, 208 Va. 28, 33, 155 S.E.2d 358, 362 (1967). Thus, unlike § 12-22-72, the Virginia statute bears at least some rational relationship to the state interest in compensating plaintiffs for delay in receiving money judgments.

Thus, appellees are left with defending the proposition that the statutes of two States—Alabama and Mississippi—are somehow constitutional notwithstanding the decision in *Lindsey* v. *Normet* and decisions of federal courts of appeals which have applied *Lindsey* to strike down federal statutory burdens on the right of access to appellate courts, *O'Day* v. *George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), and state rules, *Lecates* v. *Justice of the Peace Court No. 4*, 637 F.2d 898 (3rd Cir. 1980). If there were safety in numbers, appellees could still not overcome the clear teaching of this Court in *Lindsey* v. *Normet*. Unfortunately for appellees, there is no safe haven in the statute of one other State which, like § 12-22-72, would appear to be a relic of the Nineteenth century.

of any sum," Br., at 18, and that "Justice Embry's goal . . . was . . . not a pecuniary gain to himself." Br., at 22.[8]

Whether that Stipulation—filed almost two months after appellant first challenged Justice Embry's qualifications and almost one month after the court below denied appellant's second attempt to secure a fair hearing and after Justice Powell granted appellant's Application for Stay in this Court—has any probative value is highly doubtful.[9] Nothing in that document, however, can obliterate the fact that Justice Embry sought punitive damages for himself and the putative class from the day his suit was filed until after appellant filed its notice of appeal from the decision below; nothing can alter the fact that Justice Embry's

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[8] In a letter filed with the Clerk of this Court on November 8, 1985, appellees drew attention to a newspaper report quoting former Justice Embry as stating that he received a "tidy sum" in connection with the settlement of his class action against Blue Cross. The record presently before this Court does not establish how much money Justice Embry received for settling his class action, whether putative class members received notice of that settlement, or any other details of this highly unusual case. Appellant's challenge to Justice Embry's conduct does not, in any event, depend on establishing his subjective intent at the time he settled his case against Blue Cross. Justice Embry had two opportunities to explain his conduct as a sitting member of the court below and chose not to do so. The record presented to this Court regarding the impropriety of Justice Embry's conduct speaks for itself. Appellant is informed that the information in appellees' November 8 letter to the Clerk will be filed with the Court by appellees in a Supplemental Brief during the week of November 25, 1985.

[9] Appellant is obliged to call to this Court's attention several errors contained in the Brief of Appellees, at 18 n.14, wherein it is stated that "Appellant did not reveal [the fact of dismissal] . . . in its brief (apart from the docket sheet appended to the brief)." Appellant in fact "revealed" and relied upon the fact of dismissal to this Court in the text of its Brief, at 27-28. In addition, appellees' totally unsupported allegation in that same footnote that appellant or its counsel were aware of that dismissal prior to the filing of appellant's Reply Memorandum in this case on May 14, 1985, and their innuendo that appellant may have intentionally withheld that fact from this Court, does not warrant a response. *See Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531, 546-47 (1915).

complaint against Blue Cross raised issues virtually identical to the issues raised and decided in this case in a 5-4 opinion written by Justice Embry which, itself, exhibits in its purported "fact-finding"[10] the bias that permeated the consideration of this case below; and nothing can erase the remarkable statements made by Justice Embry under oath in his January 10, 1985 deposition while this case was pending on rehearing before him and the court below. Appellees do not dwell on these aspects of the record because they are indefensible. Instead, appellees, Br., at 21 n.18, argue that appellant's claim is "dubious" because, without Justice Embry's participation, the verdict would have presumably been affirmed by an evenly divided court below. This argument assumes the propriety of the participation by a constitutionally disqualified judge in the consideration of a case and ignores the fact that Justice Embry testified, under oath, that his opinion began as a dissenting opinion but ultimately won over the critical fifth vote in late 1984.

Appellees' defense of the six Justices who apparently did not withdraw from the putative class prior to dismissal of Justice Embry's class action appears to be that, since Justice Embry's conduct did not violate appellant's right to a fair hearing, then "[*a*] *fortiori*, the same is true for the other justices . . . ." Br., at 28.[11] Appellant does not argue

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[10] Appellees argue, Br., at 26, that nothing in the "record" establishes Justice Embry's bias against appellant. However, one of the many examples of bias which can be gleaned from a careful review of the record in this case is Justice Embry's "finding" that a claims representative of appellant was engaged in a "cover-up, through deceit," J.S. App. 37a, 470 So.2d, at 1077, a "finding" based, J.S. App. 16a, 470 So.2d, at 1067-68, on testimony presented outside the presence of the jury, R. 99. As the record reflects, counsel for appellees at trial flatly accused that representative of having "lied," *id.*, but the trial judge, after a searching inquiry, found no inconsistencies," R. 137, in the representative's sworn statements. Thus, Justice Embry's biases are reflected not only in the record before this Court but in the opinion he authored.

[11] Contrary to appellees' argument, Br., at 19 n.15, appellant has never abandoned its argument that failure of these six Justices *to withdraw* from the putative class would require their recusal from any further hear-

that the apparent failure of those six Justices to withdraw from the putative class was as constitutionally unacceptable as the conduct of Justice Embry. Appellant's position is that this Court should announce that the Constitution requires judges to recuse themselves from participation in a case under these circumstances where they have actual notice of their inclusion in a putative class and they do not withdraw from that class.[12]

IV

THE CONTRACT CLAUSE QUESTION

Appellees do not dispute appellant's proposition that *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), and other cases in this Court holding judicial actions unreviewable under the Contract Clause, have involved judicial actions interpreting state statutes or revising previous interpretations of state statutes.[13] Nor do appellees argue that the

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ing of the appellant's case. Appellees' quotation from footnote 2 of the Juris. Stat., at 9, inexplicably leaves out the phrase "in and of itself" and makes no mention of the last sentence of footnote 2, both of which make clear that appellant's challenge to members of the court below other than Justice Embry was grounded in a failure to withdraw from the putative class after notice of their membership in it. If, contrary to appellant's arguments, further proceedings in this case of a non-ministerial nature in the court below must be held, then this Court should decide now, in the interest of judicial economy, whether judges may constitutionally participate in the decision of cases under these circumstances. If any of those Justices withdrew, or indicated an intent to withdraw, from that putative class prior to April 16, 1985, there is time enough for that fact to be demonstrated on remand from this Court.

[12] The cases cited by appellees, Br. at 28 n.27, to support the proposition that Justice Embry's "voting record" demonstrates no personal bias against insurance companies generally are either irrelevant to this case because they did not raise any issue presented in appellant's appeal to the court below (six cases), or serve to illustrate the dramatic change in the "directed verdict" law made in this case (three cases). *See* appellant's Reply Memorandum, at 7 & n.5.

[13] The issue presented to this Court in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), was whether the Supreme Court of Oklahoma had

act of a state court in creating a new cause of action is functionally different from the act of a state legislature in creating a statutory right of action.

Rather, appellees argue that the word "pass," as it appears in the Contract Clause, conclusively establishes that that Clause cannot be construed to apply to judicial action in *any* circumstances. Appellees' construction of the word "pass" in the Contract Clause cannot be reconciled with operative words used elsewhere in the Constitution to describe the lawmaking process. Thus, the First Amendment provides that "Congress shall make no law . . . ," yet the First Amendment has been interpreted expressly to control judicially fashioned common law rights of action. *See, e.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964).[14] The First Amendment's specific reference to the national legislature, "Congress," in direct contrast to the more general and inclusive expression, "No State," in the Contract Clause, without limitation to the legislative branch of state government, makes it considerably more difficult to construe the First Amendment as applicable to judicial action than to so construe the Contract Clause. Indeed, appellees' argument effectively adds the word "legislature" after the introductory words of the Contract Clause, "No State." But this Court, in interpreting parallel language in the Fourteenth Amendment, has precluded the textual interpretation urged by appellees:

> "No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the

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"adopt[ed] a different construction of the controlling statutes" so as to violate Tidal Oil's "obligations of its contract . . . ." Tr. of Rec., at 152. *See* Pet. for a Writ of Certiorari, at 12; Response to Motion of Defendant in Error to Dismiss or Affirm, at 7.

[14] In applying the First Amendment, through the Due Process Clause of the Fourteenth Amendment, to control purely judicial action in *Bridges* v. *California,* 314 U.S. 252 (1941), this Court unflinchingly stated that the First Amendment "prohibits any *law* 'abridging the freedom of speech . . . .'" *Id.,* at 263 (emphasis added).

> United States .... [These prohibitions] have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities."

Ex parte Virginia, 100 U.S. 339, 346-47 (1879) (emphasis in original).

In addition, the Framers' inconsequential use of the word "pass," Br. of Appellant, at 31-36 nn. 7, 8 & 11, can surely not be deemed sufficient to overcome appellant's substantial and largely unchallenged evidence that the word "Law" was understood under English common law, and therefore presumptively by the Framers, to comprehend judicially fashioned common law. Finally, appellees' argument, Br., at 32-33 n.40, that this judicially created tort is not in any event an impairment of the contract here because it is "extra-contractual" is foreclosed by this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, No. 83-1748, slip op., at 11-16, 105 S. Ct. 1904, 1912-15 (1985).

V

THE EXCESSIVE FINES CLAUSE AND DUE PROCESS CLAUSE QUESTION

Appellees, Br., at 40, concede that "the historic purposes of punitive damages in civil cases [are] to punish ... and to deter ...." The court below confirmed that punitive damages in Alabama serve these precise functions: "To punish the defendant ... *and* to warn or deter others ...." J.S. App. 34a, 470 So.2d, at 1076. No clearer statement of the purposes of criminal law sanctions could be articulated. *See, e.g., Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (plurality opinion). Thus, under any purposive analysis, civil litigants seeking punitive damages (or "private fines" as expressed by this Court in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) have quite literally, and in the very words of this Court in *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), been "entrusted with the criminal-

law function of government." *See also Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines.").

Appellees have not responded, because there is no plausible response, to appellant's analysis based upon the purposes of the Eighth Amendment. Appellees also avoid challenging appellant's demonstration that punitive damages were regarded as "fines"—as that term was used in the Eighth Amendment and as that term was understood under English common law—in the Eighteenth century.

Instead, appellees engage in a confused and confusing attempt to equate punitive damages with "civil penalties," a different term encompassing a variety of sanctions enacted and imposed for a multitude of purposes. Appellees' discourse on "civil penalties" simply misses the point: punitive damages are identical in purpose to criminal fines, they share common historical roots with criminal fines, and therefore they should be subject to the same limits on excessiveness and the same principle of proportionality as are established by the Eighth Amendment.[15]

Appellees misunderstand the Eighth Amendment issue completely when they suggest that appellant's argument is that punitive damages cannot be imposed in a civil pro-

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[15] Appellees' reference, Br., at 33-34, to the "holding" of *Ex parte Watkins*, 32 U.S. (7 Pet. 568 (1833), is likewise confused. Watkins, a federal prisoner, had sought a writ of habeas corpus claiming that he was being illegally detained because of his inability to pay fines imposed as a result of his federal conviction. He also claimed the fines to be excessive in violation of the Eighth Amendment. In considering Watkins' Eighth Amendment claim, the Court's opinion made the simple declaratory statement, characterized by appellees as a "holding," that the "eighth amendment is addressed to the courts of the United States exercising criminal jurisdiction . . . ." *Id.*, at 574. Appellees' suggestion that this declaratory sentence addressed or resolved the applicability of the Excessive Fines Clause to punitive damages awarded in civil proceedings is obviously incorrect. The Court went on to *hold*, in the sentence that followed, that it had "no appellate jurisdiction to revise the sentences of inferior courts in criminal cases . . . ." *Id.*

ceeding. Appellant opposes *excessive* private fines. Appellees are likewise in error in suggesting that the many federal statutes providing for the recovery of punitive or treble damages by the Government or, in some cases, private litigants, would be rendered unconstitutional by appellant's argument. As appellant, Br., at 42, has pointed out, double and treble *statutory* damages were perhaps the first form of punitive damages in England;[16] because of their roots and their imposition on the basis of legislative approval, double or treble damages would presumptively not be excessive in the constitutional sense. The punitive damages in this case are, of course, more than 700 times what treble damages would have been.

Appellees' argument that the punitive damage award in this case is not, in any event, "excessive" is even more confused. Appellees suggest, Br., at 39-43, that punitive damages assessed in connection with the performance of a contract need not bear any relationship to the injury inflicted, but, rather, to a number of other factors such as the need to provide an incentive for lawsuits, Br., at 38 n.48, the emotional state of the plaintiff, Br., at 40 n.51, or the wealth or degree of sophistication of the defendant, Br., at 40-41. This attempt by appellees to justify, apparently as a matter of policy, punitive damages by reference to their speculative consequences in some cases says nothing about the central inquiry under the Excessive Fines Clause.

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[16] Although the punitive damage awards assessed in civil proceedings brought by private plaintiffs were generally paid to the Crown, *see* Br. of Appellant, at 43-44, those awards for a "public misdemeanor which is coupled with a private injury," 3 W. Blackstone, *Commentaries on the Law of England* *398 (1768), were awarded to private plaintiffs instead of the Crown as early as 1763. *See Wilkes* v. *Wood*, Lofft. 1, 98 Eng. Rep. 489 (1763). The punitive function of those awards, however, continued "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Id.*, at 19, 98 Eng. Rep., at 498-99.

The magnitude of the act for which punishment is administered is clearly the most relevant consideration in assessing the excessiveness or disproportionality of a particular punishment. *Solem* v. *Helm*, 463 U.S. 277, 290-91 (1983). As this Court observed in *Solem*, "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars . . . ." *Id.*, at 293. Here, appellant's conduct, cast in its worst light, was to withhold willfully the sum of $1,650.22. Even if this had been a theft of this amount, a $3,500,000 fine is excessive under any standard.

Under appellant's submission, Alabama would be free, by legislative or judicial action operating prospectively, to award attorneys' fees and to create other reasonable bases for compensating persons whose contractual rights have been breached. Alabama may not, however, permit its courts and juries, without discernible or reviewable standards, to award grossly excessive punitive damages simply to inflict punishment and create a windfall for an occasional plaintiff.[17]

Measured against any comparable assessment of an appropriate punishment imposed by the Alabama legislature for identical or comparable conduct, Br. of Appellant, at 44-45, measured against actual injury, measured against statutory civil punishment for violation of federal antitrust laws, or measured against any other appropriate comparison in civil or criminal jurisprudence, the punitive

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[17] Appellees' assertion, Br., at 43, that it is "likely that a substantial portion of the $3.5 million judgment represents compensation"—as opposed to punitive damages, cannot be squared with the recognition by appellees and the court below that all the damages in excess of $1,650.22 in contractual damages were *punitive* damages. As stated by the court, this case involves "a verdict for the plaintiffs in the sum of $3.501.650.22, of which sum $3.500.000 was for punitive damages." J.S. App. 1, 470 So.2d, at 1061. This *post hoc* rationalization by appellees is also contradicted by the instruction to the jury on damages, which left the jury virtually unfettered discretion to impose punitive damages bearing no relationship whatsoever to any proven actual injury inflicted on appellees. R. 589. "[P]unitive damages . . . are not awarded to compensate the injured party." *Smith* v. *Wade*, 461 U.S. 30, 49 (1983).

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No. 84-1601

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Supreme Court of the United States

OCTOBER TERM, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

SUPPLEMENTAL BRIEF OF APPELLEES

JACK N. GOODMAN *
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

November 27, 1985

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SUPPLEMENTAL BRIEF OF APPELLEES

Appellees Margaret W. Lavoie and Roger J. Lavoie, Sr. submit this supplemental brief pursuant to Rule 35.5 of the Rules of this Court concerning a matter arising since the filing of Appellees' brief.[1]

ARGUMENT

Argument III of that brief relating to the participation in the proceedings before the Supreme Court of Alabama by Justice T. Eric Embry stated, based upon a stipulation which terminated certain litigation involving

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[1] Counsel for Appellees initially addressed this matter in a letter to the Clerk submitted November 8, 1985.

Justice Embry, that it did not appear that any damages had been paid to him by Blue Cross and Blue Shield of Alabama in settling the case. See Brief of Appellees at i, 18, 22 & 23 n.21. At the time the brief was prepared, inquiries to counsel for both Blue Cross and Justice Embry revealed that the terms of the settlement agreement barred discussion of the case by the parties,[2] leaving the stipulation the only authority available as to the terms of the settlement.

From reports in the press[3] and a deposition of a senior Blue Cross official taken in another matter,[4] it now appears that, in addition to the commitments made by Blue Cross to improve claims practices, Justice Embry received a payment of 30,000 dollars. Blue Cross understood that this amount was intended to cover Justice Embry's legal fees.

From the deposition (a copy of which has been lodged with the Clerk), it appears that Blue Cross determined to settle the action, not because of any increased fear of liability resulting from the decisions of the Supreme Court of Alabama in *Nationwide* or the case at bar, but instead because of the economic burden in terms of legal expenses, computer time, and other resources that would have had to have been expended in defending the class action suit.[5]

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[2] The confidentiality agreement was required by Blue Cross, not Justice Embry.

[3] Legal Times, Nov. 11, 1985, at 2; Los Angeles Times, Nov. 3, 1985, at 10, col. 3.

[4] *Nationwide Mutual Insurance Co. v. Clay*, 469 So. 2d 533 (Ala. 1985), *petition for cert. filed*, 53 U.S.L.W. 3896 (No. 84-1942) (June 13, 1985). The deposition of A. Grey Till, Jr., a Blue Cross official, was taken November 14, 1985 pursuant to Ala. R. Civ. P. 27(b).

[5] None of the documents produced by Blue Cross relating to the settlement contain any mention of these decisions at all.

The fact that Justice Embry received a modest amount in the settlement does not alter the analysis in Appellees' brief. The thrust of both the suit and the settlement, as the stipulation indicated, was to alter deficient claims practices. There is no allegation that those practices were the same as, or even similar to, the abusive practices of Appellant which led to the judgment below.

There is also no indication that the settlement resulted from any perception by Blue Cross of any impropriety on Justice Embry's part. The Blue Cross official indicated that it was his expectation that if the Embry suit reached the Supreme Court of Alabama, Justice Embry would not participate in the decision.[6] Blue Cross was indeed aware that Justice Embry had recused himself in another case involving a bad faith claim against Blue Cross.[7] Although the official indicated a belief that the decision in the instant case had broadened the factual contexts of bad faith liability in Alabama, he conceded that it was no different than earlier decisions of the Alabama court concerning the bad faith tort. There was absolutely no suggestion that the decision below played any part in Blue Cross' decision to reach a settlement in the Embry case.

The additional information revealed since the filing of Appellees' brief confirms the lack of any relation between Justice Embry's suit and the case at bar which rendered his participation in the Alabama court's decision constitutionally infirm. Apart from the fact that both were actions for bad faith denial of insurance claims, the cases bore little similarity to each other. Not even Blue Cross,

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[6] At the time the case was settled, Blue Cross had moved to disqualify the trial judge due to his membership in the putative class, a motion which Blue Cross recognized might make it very difficult to find any judge to try the case.

[7] *Blue Cross and Blue Shield of Alabama v. Granger*, 461 So. 2d 1320 (Ala. 1984).

the defendant in Justice Embry's suit, viewed the *Lavoie* decision as determinative of the other suit. Appellant, therefore, was not denied its right to due process as a result of Justice Embry's role as one member of the Alabama court's majority.

CONCLUSION

For these reasons and those in Appellees' brief, this Court should dismiss this appeal or, if it concludes that it has jurisdiction, should affirm the judgment of the Supreme Court of Alabama.

Respectfully submitted,

JACK N. GOODMAN *
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

ALVIN T. PRESTWOOD
Suite 209
One Court Square
Montgomery, Alabama 36104
(205) 832-4120

JOSEPH M. BROWN, JR.
CUNNINGHAM, BOUNDS, YANCE,
CROWDER & BROWN
1601 Dauphin Street
Mobile, Alabama 36660
(205) 471-6191

Attorneys for Appellees

* Counsel of Record

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ON APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF FOR GOLDEN RULE INSURANCE COMPANY AS AMICUS CURIAE SUPPORTING APPELLANT

DAVID A. STRAUSS
1111 East 60th Street
Chicago, Illinois 60637
(312) 962-9494

Counsel of Record

Of Counsel:

DARRELL S. RICHEY
Vice President and General Counsel
Golden Rule Insurance Company
Lawrenceville, Illinois 62439

GUY E. MCGAUGHEY, JR.
McGaughey and McGaughey
Lawrenceville, Illinois 62439

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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36 pp

QUESTION PRESENTED

Golden Rule Insurance Company will address the following question:

Whether a state court may constitutionally impose punitive damages on appellant for the manner in which it processed an insurance claim, when appellant's conduct was not prohibited by the insurance policy and appellant had no notice that such conduct could be the basis for an award of punitive damages.

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INTEREST OF THE AMICUS CURIAE

This case concerns the power of a state court to impose punitive damages liability on an insurance company on a retroactive basis — that is, because the insurer denied a claim in a manner that was not wrongful when it occurred. Golden Rule Insurance Company—which began 45 years ago in the basement of a home in a small town—is a family-owned business and, until very recently, remained one of the many small insurance companies in the nation. The punitive damages awarded against appellant in this case would have constituted 14 percent of Golden Rule's entire benefit payments for the year 1981. A massive, unpredictable damages award presents a particularly severe danger to the efforts of an insurer of the size of Golden

Rule to meet its customers' needs. For this reason, Golden Rule may be able to provide the Court with a useful perspective on the question it addresses.*

STATEMENT

1. Appellant, an insurance company, agreed with the City of Mobile, Alabama, to provide group health and medical insurance to City employees. Appellee Roger Lavoie is a retired City employee; appellee Margaret Lavoie, his wife, is insured as a dependent. In February 1977, Mrs. Lavoie, who had suffered from osteoarthritis for many years, complained to her physician of anxiety, gastrointestinal disorders, and arthritis pains. Her physician recommended that she be admitted to a hospital. J.S. App. 2a-3a. During Mrs. Lavoie's 23-day stay in the hospital, her physician "ordered medical diagnostic tests * * *, an electroencephelogram (EEG), and electrocardiogram (EKG), a gastrointestinal series (GI series), a barium enema, a computer assisted tomogram (CAT scan) and various other tests." *Id.* at 3a. When she was discharged from the hospital, the "discharge summary" prepared by her physician reported that her arthritis was not unusually severe for her age, that she had no gastrointestinal disorder, and that her symptoms were primarily psychosomatic (*id.* at 4a).

On March 3, 1977, the hospital submitted a bill to appellant for approximately $3,000. The claim was reviewed by Brenda Harris, an employee in appellant's Mobile office, and by Jean Becker, a Senior Claims Examiner in appellant's Hartford office. Appellant paid almost half the claim but denied approximately $1,650 of it. J.S. App. 4a-6a. Appellant notified appellees of the denial on June 3, 1977, explaining to appellees that the claim was not covered by the City of Mobile policy because "it appears the evaluation and test could have been performed on an out-patient basis * * * [and] the CT Brain

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*Letters from counsel of record for each of the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Scan, EEG and EKG * * * are not usual and customary procedures for the diagnosis given." *Id.* at 6a.

Following this initial partial denial of appellees' claim, appellees' physician wrote two letters explaining his actions. These letters were reviewed by Harris and by Senior Claims Examiner Hutton. They determined that appellant should continue to deny appellees' claim and so notified appellees in December 1977. Subsequently, appellant obtained other material concerning appellees' claim from the hospital's files. These documents, together with the rest of the file except for the physician's letters, were reviewed by Senior Claims Examiner Mann and by Dr. Swan, a physician employed by appellant. They, too, concluded that appellant should persist in its partial denial of the claim. Appellees were notified of this conclusion in August 1978. J.S. App. 6a-10a.

2. Appellees then brought this suit in Alabama state court. They sought $1,650 for an alleged breach of contract and, in their final amended complaint, $30 million in compensatory and punitive damages (see J.A. 24-33) for various alleged torts arising out of appellant's refusal to pay their insurance claim. See J.A. 6-33.

The trial court dismissed the tort counts of the complaint on the ground that they failed to state a claim on which relief could be granted. See *Lavoie v. Aetna Life and Casualty Co.* (*Lavoie I*), 374 So. 2d 310, 310 (Ala. 1979). The Alabama Supreme Court reversed, stating (*id.* at 312): "[T]his court has not foreclosed the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits due under an insurance policy. * * * This is not to say * * * that this court will in fact recognize such a theory. It merely means that sufficient facts have not been presented in an actual case so as to genuinely pose the issue for our decision one way or the other."

On remand, the trial court granted summary judgment for appellant on the tort claims. See J.A. 3; *Lavoie v. Aetna Life and Casualty Co.* (*Lavoie II*), 405 So. 2d 17, 18 (Ala. 1981). While an appeal was pending in the Alabama Supreme Court,

that court decided *Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1 (1981), in which it announced that it was, for the first time, "recogniz[ing] the intentional tort of bad faith in first party insurance actions." *Id.* at 6. The Alabama Supreme Court then reversed the entry of summary judgment against appellees and remanded for reconsideration in light of *Chavers*. *Lavoie II*, *supra*.

On the second remand, the case was tried to a jury, which returned a verdict in favor of appellees. It awarded them $1,650 on their breach of contract claim and $3.5 million in punitive damages on the tort claim. J.S. App. 1a; J.A. 4.

3. a. The Alabama Supreme Court affirmed by a vote of 5-4. J.S. App. 1a-63a. The court first determined that the evidence was sufficient to show that appellant had committed the newly-created tort (*id.* at 12a-31a). The court relied on three facts as the basis for this conclusion: first, that while appellant's employees had reviewed many of Mrs. Lavoie's medical records, they did not obtain certain other records that were available from the hospital (*id.* at 13a-14a, 26a); second, that appellant's claims examiners did not consult a physician before making their initial determinations to deny appellees' claim in part (*id.* at 20a-21a, 25a); and third, that this failure to consult a physician early in the process violated appellant's internal rules (*id.* at 13a, 18a, 21a, 31a). The Alabama Supreme Court did not at any point identify evidence suggesting that appellant had adopted policies likely to lead to the denial of meritorious claims; that any of appellant's employees acted out of malice or personal animosity toward appellees; that appellant's employees had determined to deny appellees' claim before they considered its merits; or that appellant's employees had denied the claim even though they believed that it should be allowed. Instead, the court based its decision solely on the procedures followed by appellant's employees: the manner in which the physician was involved in the process of adjudicating the claim, and the thoroughness with which Mrs. Lavoie's medical records were examined.

In addition, the Alabama Supreme Court specifically rejected appellant's argument that because its decision to deny appellees' claim was, in fact, reasonable, it should not be held liable for the tort of bad faith failure to pay an insurance claim. Appellant pointed out that there was conflicting medical testimony at trial concerning whether Mrs. Lavoie's treatment was medically reasonable and necessary and that appellees' breach of contract claim had gone to the jury. Appellant urged that since its decision to deny part of the claim was therefore supported by reasonable arguments, it could not be said to have acted in bad faith; it simply had made a legitimate decision to deny benefits that turned out to be incorrect. J.S. App. 25a.

The Alabama Supreme Court did not question that appellant's partial denial of appellees' claim was reasonable; on the contrary, the court appeared to acknowledge that there were legitimate grounds supporting a partial denial of the claim. But the court ruled that the actual reasonableness vel non of appellant's decision was irrelevant. The court's discussion was as follows (J.S. App. 25a-26a):

> Two of five physicians testifying at trial stated that [appellant's] actions in denying the claim were reasonable because the charges in question were not shown to be medically "necessary for the treatment of the injury or disease concerned;" the language contained in the policy exclusion. Nevertheless, [appellant's] argument is critically defective in that *at the time of each successive denial* [appellant] *had never once consulted any medical authority.* That [appellant] is now capable of creating a fact issue on the contract claim through expert testimony does not, and cannot, belie the fact that [appellant] never sought medical consultation, nor reviewed the treating physician's detailed medical reports, nor reviewed any progress notes before denying an admittedly complicated medical claim. A thousand experts testifying retrospectively could not avert the fact that, without a doubt, [appellant] recklessly disregarded the facts and proofs of claim submitted by the Lavoies. *Gulf Atlantic [Life] In-*

> *surance Co.* [*v. Barnes*], 405 So. 2d [916,] 924 [(Ala. 1981).[1]]

The court also rejected appellant's contention that the award of punitive damages was excessive (J.S. App. 33a-38a), stating that it could not conclude that "the verdict was a result of bias, passion, prejudice, or some other improper motive" (*id.* at 38a).

b. Chief Justice Torbert, in a dissenting opinion joined by Justice Beatty (J.S. App. 40a-56a), stated that he was "unable to find any evidence that would authorize a jury to find that [appellant] knew no debatable reason [for denying appellees' claim] existed. In fact, the evidence supports the conclusion that [appellant] thought, and, as it turns out, was correct in thinking, that a debatable reason did exist and therefore that denial of the claim was proper." *Id.* at 56a. Chief Justice Torbert also noted that "[t]he tort of bad faith breach of an insurance contract was judicially created to fill a remedial void" (*id.* at 40a) and that "[t]he whole question of bad faith by insurance companies might be an issue more properly addressed by the legislature" (*id.* at 44a). He further remarked that he would view a bad faith failure to pay an insurance claim as a breach of an implied term of the contract for which the insured could receive consequential damages such as for "inconvenience, annoyance, [or] loss of job or business" (*id.* at 40a) but not punitive damages. He explained that this approach would avoid "the excesses of passionate juries" and would enhance the stability of expectations, which "is certainly important in the insurance context, where predictability * * * is necessary in calculating premiums." *Id.* at 41a.

Justice Maddox, in an opinion joined by Justice Shores, also dissented (J.S. App. 56a-63a). He concluded that "it is apparent

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[1]On the page cited by the court from *Gulf Atlantic Life Insurance Co.*, the following sentence appears: "Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith." This appears to be precisely the opposite of what the court said in this case. See also pages 19-20, *infra*.

that the insureds were not entitled to recover on the bad faith claim, because they failed to meet their burden of showing that the insurer 'had no legal or factual defense to the insurance claim.' *National Security Fire & Casualty Company v. Vintson*, 454 So. 2d 942 (Ala. 1984)." J.S. App. 56a.

SUMMARY OF ARGUMENT

A. At the time appellant issued its insurance policy to the City of Mobile, and at the time appellant denied appellees' claim, it had no way of knowing that its actions could give rise to a massive award of punitive damages. The terms of the insurance policy did not impose on appellant the duty that the Alabama Supreme Court found to have been breached, and certainly did not specify that a breach of such a duty could be punished by a monetary penalty far in excess of any actual damages. The controlling decisions of the Alabama Supreme Court at the time appellant acted contained explicit statements to the effect that even if an insurer maliciously denied a claim in bad faith, the insured could not be awarded damages beyond the amount specified in the policy plus interest. And while it is reasonable to presume that appellant knew it had an implicit duty to act in good faith, the actions that the Alabama Supreme Court declared to be wrongful in this case do not correspond to any common sense conception of "bad faith."

B. This decision of the Alabama Supreme Court to impose retroactive punitive damages liability on appellant violates the Contract Clause and the Due Process Clause because it is not rationally related to the promotion of any state interest and it places an unreasonably harsh and oppressive burden on appellant. This Court has stated that it will "hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976) (citations omitted). That is the only theory supporting an award of punitive damages. It serves no rational state purpose to impose punishment on appellant for conduct that appellant could not have known was wrongful at the time it occurred.

Moreover, even if some purpose could be served by imposing retroactive liability on appellant, an award of punitive damages is a particularly indiscriminate and arbitrary means of furthering that purpose. Punitive damages bear no necessary relationship to any loss actually suffered, and juries exercise almost standardless discretion in awarding punitive damages. In addition, no purpose is served by awarding punitive damages against appellant for actions of employees that deviate from appellant's general policies and procedures, as the Alabama Supreme Court did here. That is especially true where, as here, the court below did not dispute that the denial of appellees' claim was, in fact, reasonable. Indeed, important social purposes are *dis*served when insurers are given such a strong incentive to pay unmeritorious claims.

Finally, the decision of the Alabama Supreme Court is unreasonably burdensome because it imposes retroactive liability in an area governed by a contract, and because the imposition of retrospective liability on an insurer is particularly disruptive. An insurer can function only if it is able to predict, with reasonable certainity, the liabilities to which it will be exposed. As this Court has explained, "'[d]rastic changes in the legal rules governing * * * insurance funds'" can " 'jeopardize[] the insurer's solvency and, ultimately, the insureds' benefits.'" *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247 (1978) (citation omitted). The unforseeable imposition of a $3.5 million liability because of the denial of a $1,650 claim is such a drastic and unreasonable change.

C. Because the decision of the Alabama Supreme Court interferes with obligations settled by contract, imposes a harsh and oppressive burden on appellant, and is not rationally related to the promotion of a state interest, it violates the Contract Clause and the Due Process Clause. While the Court has not applied the Contract Clause to decisions by state courts interpreting state statutes, there is no reason to exempt all actions by state courts from scrutiny under the Contract Clause. And even if the Contract Clause does not apply to the decision of the court below, this Court has frequently recog-

nized that a judicial decision imposing an unreasonable retroactive liability violates the Due Process Clause.

ARGUMENT

The Retrospective Award Of Punitive Damages Against Appellant Violates The Contract Clause And The Due Process Clause

The Alabama Supreme Court has upheld the imposition of massive punitive damages on appellant for actions that the court did not declare to be wrongful until well after appellant had engaged in them. We submit that this decision by the court below alters the terms of appellant's contract with appellees, is not a rational means of promoting any state interest, and subjects appellant to a harsh and arbitrary burden. It therefore violates the Contract Clause of the Constitution, Art. I, Sec. 10, Cl. 1, and the Due Process Clause of the Fourteenth Amendment.

We recognize that the tort created by the Alabama Supreme Court and retroactively applied to appellant was denominated a "bad faith" failure to pay an insurance claim. In urging that the court should not have imposed retroactive punitive damages liability on appellant, we are of course not suggesting that appellant, or any other insurer, has a vested right to act in bad faith. If the court below had simply held that an insurer will be responsible for the consequences of actions that plainly constituted a malicious or bad faith processing of claims, our view of this case would be quite different.

But in this case, the courts below have imposed not compensatory but punitive damages, and they have imposed these damages for conduct far removed from the core of any reasonable conception of bad faith. We do not, for present purposes at least, question that Alabama has the power to define its tort of "bad faith" in any way it chooses. But the state may not define that tort in a novel way and then impose punitive damages for acts that occurred before the tort was even created. If a state regulatory agency were to issue rules governing the processing

of insurance claims, apply those rules on an ex post facto basis to conduct that occurred well before the rules were announced, and then impose fines in the millions of dollars on insurers whose previous conduct did not conform to those rules, the agency's actions would clearly be unconstitutional. We submit that the actions of the Alabama Supreme Court in this case are indistinguishable from those of such a hypothetical agency.

A. It is clear that when appellant entered into the contract of insurance that gave rise to this litigation, and took the actions for which it was held liable, it had no fair notice that its actions could give rise to massive punitive damages liability. Appellant entered into a contract of insurance with the City of Mobile in 1967. J.A. 35. Appellees submitted the claim that gave rise to this litigation in March 1977, and appellant initially denied that claim in June 1977. At that time, Alabama law did not recognize a tort of bad faith failure to pay an insurance claim. On the contrary, the opinions of the Alabama Supreme Court strongly suggested that no such tort existed.

In *Calvert Fire Insurance Co. v. Green*, 180 So. 2d 269 (Ala. 1965), an insured asserted that the insurance company negligently delayed the payment of his claim. The Alabama Supreme Court unanimously overturned a judgment in favor of the insured, holding that the insurance company had no duty to exercise due care in adjusting claims. The court quoted with approval the following statement from a treatise (*id.* at 271; citation omitted):

> "It has been held that, in the absence of statutes, the insured cannot recover damages beyond legal interest because of the insurer's delay or refusal to pay the amount of a loss. And even where the insurer's action was wilful, such as refusing to pay a loss in order to take advantage of the insured's need for ready money wherewith to re-establish his business, it did not constitute a tort so as to entitle the insured to damages beyond interest."

The court also endorsed "the principle that a claim for damages for the mere nonpayment of money due under a contract, above

or in addition to interest, cannot be recovered." *Ibid.* And the court declared (*id.* at 272): "We cannot defeat the express terms of a policy of insurance by judicial interpretation; we must enforce the contract as it is written, and not attempt to make a new contract for the parties."

In 1976 — shortly before the events that gave rise to this decision — the Alabama Supreme Court, again without dissent, ruled that an insured's claim that an insurance company "fraudulently and maliciously failed to pay the claims made under the policy" should have been dismissed because it "fails to state a claim upon which relief may be granted sounding in tort." *Old Southern Life Insurance Co. v. Woodall*, 326 So. 2d 726, 732. The court held that such a claim "sounds in contract" (*ibid.*), thus making it clear that no punitive damages would be awarded even if an insurer "fraudulently and maliciously refus[ed] to pay a claim" (*ibid.*).[2]

So far as we can determine, this was the state of the law in Alabama when Harris, Becker, and Hutton reviewed appellees' claim and denied it in part. It was not until April 1978 — ten months after the initial denial of appellees' claim — that the Alabama Supreme Court even went so far as to say that it "has

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[2]We note that the *Old Southern* opinion contains the following statements (326 So. 2d at 732):

> There might be circumstances under which the failure to pay a claim under a policy of insurance would create a claim upon which relief may be granted sounding in tort, but such circumstances are not presented in this case. * * * We need not decide that question since, under the record before us, there are no circumstances shown which indicate that the company tortiously denied the claim.

The insured in *Old Southern*, however, had alleged a fraudulent and malicious refusal to pay a claim, and the Alabama Supreme Court ruled that the insured had failed to state a cause of action. Thus, this language in the opinion must refer to the possibility that some extraordinarily egregious action by an insurer could give rise to liability — not to the possibility that an allegation like appellees', which is indistinguishable from the allegation made by the insured in *Old Southern*, could be actionable.

not rejected first party bad faith tort actions against an insurer." *Childs v. Mississippi Valley Title Insurance Co.*, 359 So. 2d 1146, 1152. As we noted, the court reiterated this position on the first appeal of this case (*Lavoie I*, 374 So. 2d at 311-312).[3]

In *Chavers v. National Security Fire & Casualty Co.*, *supra*, the court announced the creation of the tort. In cases decided the same day, the court referred to *Chavers* as the decision in which it "recognized the intentional tort of bad faith in first party insurance actions." *Lavoie II*, 405 So. 2d at 18; see, *e.g.*, *Cambron v. Association Life Insurance Co.*, 405 So. 2d 17 (Ala. 1981). Moreover, the court in *Chavers* explicitly retreated from the "seemingly broad" decision in *Calvert Fire Insurance Co.* — a decision that had appeared to preclude any actions against an insurer for failure to pay a claim. See 405 So.2d at 5. But *Calvert Fire*, not *Chavers*, was the latest authoritative pronouncement of the Alabama Supreme Court at the time of the events that gave rise to this suit.

B. The Alabama Supreme Court has, therefore, retroactively imposed a punishment — punitive damages — on appellant for acts that could not have given rise to such punishment under the law in existence either at the time appellant entered into its contract with the City of Mobile or at the time of the actions for which appellant was held liable. In Part C, *infra*, we show that a retrospective imposition of punitive liability in these circumstances by a court violates both the Contract Clause and the Due Process Clause.

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[3]See also *Vincent v. Blue Cross-Blue Shield*, 373 So. 2d 1054, 1056-1057 (Ala. 1979) (Jones, J., concurring) (footnote omitted) (remarking that "it is apparent that counsel for both parties, with the cooperation of the trial Court, were seeking to structure a convenient and inexpensive vehicle through which this Court could deliver a more definitive follow-up on the dicta * * * respecting the potential tort remedy in Alabama for bad faith breach of contract"); *id.* at 1056-1065 (endorsing the creation of such a tort); *id.* at 1065-1068 (Embry, J., dissenting) (same).

As our discussion in Part C will demonstrate, while there may be room for disagreement over the specific constitutional rubric that applies to the actions of the court below, this Court, in its decisions interpreting the Due Process Clause, has made clear the minimum requirements that must be met by any measure that imposes retrospective liability on a person. First, "retroactive [measures] * * * have to meet a burden not faced by [measures] that ha[ve] only future effects." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, No. 83-245 (June 18, 1984), slip op. 11; see *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976). Second, a retroactive measure must be "supported by a legitimate [state] purpose furthered by rational means" (*Pension Benefit Guaranty Corp.*, slip op. 11). That is, the fact that there is a rational basis for applying a measure prospectively is not sufficient to uphold its retrospective application; a state must provide an independent "justification for the retrospective imposition of liability" (*Turner Elkhorn Mining Co.*, 428 U.S. at 17). "The retroactive aspects of [a measure], as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Ibid.* Third, a retrospective imposition of civil liability will violate the Due Process Clause if it is "particularly 'harsh and oppressive.'" *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977), quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938); see, *e.g.*, *Pension Benefit Guaranty Corp.*, slip op. 15; *United States v. Darusmont*, 449 U.S. 292, 299 (1981).

The decision of the Alabama Supreme Court fails to meet these minimum standards. Its retroactive imposition of punishment, for conduct that appellant could not reasonably have known was wrong, furthers no state interest. The form of that punishment — punitive damages — is particularly likely to impose an arbitrary and irrational burden. And the court below has imposed this highly disruptive form of liability on the business of insurance, which is not only governed by contracts that parties rely on to preserve the stability of their expecta-

tions but is an area in which predictability is of paramount importance.

1. In *Usery v. Turner Elkhorn Mining Co.*, *supra*, the Court stated: "[W]e would * * * hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness." 428 U.S. at 17-18 (citations omitted). These are the *only* purposes of an award of punitive damages — to punish a blameworthy defendant and to deter others from similar conduct. See, *e.g.*, *Smith v. Wade*, 461 U.S. 30, 54 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981); Restatement (Second) of Torts § 908(1) (1977). When the Alabama Supreme Court held that the $3.5 million punitive damages award against appellant was not excessive, it explicitly stated that deterrence and punishment were the interests served by punitive damages. See J.S. App. 34a.

As the Court recognized in *Turner Elkhorn Mining Co.*, these interests are seldom furthered by a retrospective imposition of liability. The prospect of punishment for violation of a prohibition can only deter a person who is aware of the prohibition, and it makes no sense to inflict retribution on a person who could not reasonably have known that he did wrong. By the same token, a prospective rule will, in general, fully deter all those who may be contemplating wrongful conduct. See, *e.g.*, *United States v. Peltier*, 422 U.S. 531, 542 (1975); *Turner Elkhorn Mining Co.*, 428 U.S. at 40 n.5 (Powell, J., concurring). See also *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68-70 (1910) (upholding the constitutionality of an award of punitive damages only after noting that "[t]he law in controversy has no *ex post facto* element or effect in it").

We recognize, of course, that there may be instances in which deterrent purposes will be served by penalizing conduct that had not been unequivocally declared wrongful at the time it occurred. This will be true if the conduct is obviously or intrinsically wrong, or if it is reasonable to expect a person to have anticipated that such conduct would be declared unlawful. See, *e.g.*, *United States v. Johnson*, 457 U.S. 537, 560-561 (1982).

But the conduct of appellant's employees that formed the basis of the massive punitive damages award against appellant was not in any sense malum in se. As we noted, the Alabama Supreme Court, in upholding the jury's verdict, did not identify any evidence suggesting that any employee of appellant denied appellees' claim with malice or out of a desire to cheat or defraud appellees. Nor did the court indicate that appellant gave no consideration to appellees' claim or only sham consideration. Rather, the Alabama Supreme Court objected to somewhat technical details of the way in which appellant's employees processed the claim: it believed that they should have considered other medical records besides the numerous records that were before them, and it concluded that they should have submitted appellees' claim to a physician earlier in the process.

There is, we assume, no constitutional impediment to a state court's deciding to regulate an insurer's practices in such detail. But no deterrent purpose — or any other discernible purpose — is served by punishing appellant because its employees failed to anticipate that such a detailed regulatory code would be imposed by the court long after they had acted.

2. a. Even if a purpose were served by imposing a retroactive penalty on appellant, the form of the penalty chosen by the Alabama Supreme Court — a punitive damages award determined by a jury — is an indiscriminate and irrational means of furthering that purpose. Punitive damages are an "extraordinary sanction" (*International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979)) in part because they are an exceptionally crude means of furthering the state's objectives. As this Court has explained in limiting punitive damages awards in defamation actions (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)):

> In most jurisdictions jury discretion over the amounts awarded [as punitive damages] is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable

> amounts bearing no necessary relation to the actual harm caused. * * * [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

Seven Members of this Court have agreed that " 'the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined.' " *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting), quoted in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985), slip op. 6 n.4 (Brennan, J., dissenting). The "standards" on which the award of punitive damages against appellant was based were ill-defined indeed: they did not even come into existence until after the conduct that formed the basis of the claim against appellant had already occurred; they then varied from case to case (see pages 5-6 and note 1, *supra*); and they do not correspond to any common sense notion of what constitutes bad faith.[4]

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[4]The dangers of indiscriminate and excessive punitive damages awards are heightened when the defendant is an insurance company. This Court has noted that a defendant perceived by a jury as having a "deep pocket" is particularly likely to be subject to excessive punitive damages awards. *City of Newport*, 453 U.S. at 270-271. See also *International Brotherhood of Electrical Workers*, 442 U.S. at 50-51 n.14 ("[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants. * * * Community hostility toward unions, management, or minority views can thus find expression in punitive awards."); *Gertz*, 418 U.S. at 350. In most jurisdictions, the general rule is that evidence that a defendant is protected by liability insurance is inadmissible. See, *e.g.*, *McCormick's Handbook of the Law of Evidence* (E. Cleary ed. 1972) 479. The reason for this rule is that a jury is too likely to act irrationally when afforded an opportunity to benefit an injured plaintiff at the expense of an insurance company. Those factors make it likely that even a prospective award of punitive damages in a case such as this will be arbitrary and irrational.

b. The decision of the Alabama Supreme Court to award retroactive punitive damages in this case was irrational for the additional reason that the award was made against appellant, when it was the actions of appellant's employees that the court determined were tortious. The court did not uphold the punitive damages award against appellant on the basis of evidence that appellant's policies or internal procedural rules resulted in the bad faith denial of appellees' claim (cf. *Monell v. Department of Social Services*, 436 U.S. 658, 690-695 (1978)); on the contrary, the court criticized appellant's employees for deviating from those rules. See, *e.g.*, J.S. App. 13a, 18a, 21a, 31a. Appellant's liability therefore appears to be based on a theory of respondeat superior. Notably, it is not clear that respondeat superior liability in punitive damages could be imposed in a case of this kind under the rule adopted by the Restatement of Torts. See Restatement (Second) of Torts § 909 (1977). See also *Lake Shore & Michigan Southern Railway v. Prentice*, 147 U.S. 101, 110 (1893): "Though the principal is liable to make compensation for a [tort committed] by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate."

But whatever the correct tort law rule, it is difficult to see what rational state purpose is advanced by imposing massive punitive liability on appellant for acts of its employees that are inconsistent with company policies and procedures. This Court has said that the principal purposes served by the doctrine of respondeat superior are as follows (*Monell*, 436 U.S. at 693-694; citations omitted):

> [T]wo justifications tend to stand out. First is the common-sense notion that no matter how blameless an employer appears to be in an individual case, accidents might nonetheless be reduced if employers had to bear the cost of accidents. Second is the argument that the cost of accidents should be spread to the community as a whole on an insurance theory.

The second justification mentioned by the Court obviously cannot justify an award of punitive damages; there is no possible justification for taking from appellant's stockholders and other customers, who have done no wrong, in order to give appellees a windfall that vastly exceeds any loss they have suffered.

The first justification identified by the Court is also a questionable basis for imposing respondeat superior liability for punitive damages, even when no element of retroactivity is involved. The threat of damages will, of course, encourage an employer to take steps to reduce the likelihood that its employees will injure others. When only compensatory damages are imposed on the employer, the employer is forced to internalize the true costs of the employee's wrongs, and it can be argued that the employer will have the proper incentive to reduce to an optimal level the number of wrongful acts committed by its employees. But when an employer is threatened with a massive punitive damages award that is utterly unrelated to any actual damage that an employee might do, its incentive is to take excessive measures in an attempt to avert any possibility of a situation in which a jury might impose such an award.

The award against appellant, for example, will give an insurer an incentive to require its employees to pay every remotely arguable claim. The result will be the payment of unjustified claims—to the detriment of the insurer's other customers, whose premiums will have to be raised to keep up with higher claims costs. Society has no interest in compelling insurers to act in this way.[5] And if, as in this case, the insurer cannot even

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[5]Indeed, in a situation such as that presented by this case, there is an important social interest in encourgaging insurers to examine claims closely and not to pay them uncritically. In the health care market, often only the insurer has a financial incentive to try to reduce costs. As President Carter explained in proposing to Congress legislation to contain hospital costs:

> The hospital sector is fundamentally different from any other sector in our economy. Normal buyer-seller relationships and normal market

know in advance the nature of the conduct on the part of its employees that will give rise to a punitive damages award against it, a hopelessly irrational element is introduced into its planning.

c. Finally, the Alabama Supreme Court ruled that because appellant's employees acted incorrectly in evaluating appellees' claim, appellant could not escape an award of punitive damages even by demonstrating that it in fact had a reasonable basis for denying that claim. See pages 5-6, *supra*, quoting J. S. App. 25a-26a. Indeed, it appears that under the reasoning of the Alabama Supreme Court, appellant could have been held liable in punitive damages even if it had demonstrated in court that it was entirely *correct* in denying appellees' claim; the court stated that even if "[a] thousand experts" testified that an insurer's decision to deny a claim was reasonable, the insurer could be held liable if the employees who made the decision did not have sufficient evidence before them when they acted. J.S. App. 26a.

As we noted, this ruling by the Alabama Supreme Court marked a sharp departure from the law it had previously established. See pages 5-6 and note 1, *supra*. It is also a further irrational aspect of the court's approach. Whatever the merit of imposing a penalty on an *employee* who acts improperly — and that would ordinarily be a matter best left to internal disciplin-

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forces do not exist. The consumer of services — the patient — rarely pays the bill directly. Nor does the patient decide what services he or she will receive in the hospital. The person who makes those decisions — the physician — does not pay the bill either, and therefore has little or no incentive to see that services are provided in an efficient manner. Often, doctors do not even know the costs of the tests and x-rays they order.

15 Weekly Comp. Pres. Doc. 387-388 (1979).

By imposing on appellant a crushing liability for making a reasonable decision not to pay a claim for what turned out to be unnecessary tests, the decision of the court below creates a perverse incentive for the only actor in the health care market that is in a position to help remedy the important national problem of rising health care costs.

ary mechanisms — it makes little or no sense to punish *appellant* when its procedures did, after all, lead to a correct result: they resulted in the denial of a claim that appellant had a reasonable basis for denying.

In sum, the court below has imposed a massive and arbitrarily-determined penalty on appellant for the breach of a duty that did not exist — and was certainly not thought to give rise to a punitive damages award — when the alleged breach occurred; and it has imposed this penalty even though it has no quarrel with the procedures appellant has officially prescribed for its employees, and even though the procedures followed in this case led to a reasonable denial of a claim. This is the paradigm of a "harsh and oppressive" penalty that serves no rational state interest.

3. Finally, the Alabama Supreme Court has imposed retroactive liability in an area — the business of insurance — where expectations are settled by contract and where the stability of expectations is exceptionally important. The rights of appellees against appellant were comprehensively defined by the insurance policy issued by appellant to the City of Mobile (J.A. 34-48).[6] That contract contained no provision requiring appellant to process claims in the manner demanded by the Alabama Supreme Court, and it certainly did not provide for large monetary penalty to be imposed on the insurer if it processed a claim in an incorrect manner. As we explain below (pages 22-27, *infra*), the decision of the Alabama Supreme Court impaired the obligations of that contract and accordingly violated the Contract Clause of the Constitution.

But even if the Contract Clause does not apply of its own force in this case, that Clause reflects "the high value the Framers placed on the protection of private contracts." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). "Contracts enable individuals to order their personal and busi-

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[6]Since the policy was negotiated between appellant and the City of Mobile, there is no reason to suspect that its terms reflect any significant inequality in bargaining power.

ness affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Ibid.* Because parties enter into a contract in order to secure certain expectations, a retroactive measure is particularly burdensome and unfair when it interferes with rights secured by a contract.

In addition, the retrospective imposition of liability on an insurer is extraordinarily disruptive because in the business of insurance, as this Court has said, "the element of reliance [is] vital" (*Allied Structural Steel Co.*, 438 U.S. at 246). Insurers constantly incur liabilities; the successful operation of an insurance business depends on calculating the liabilities that the insurer will face and establishing premiums and reserves accordingly. As the Court has noted, a punitive damages award is always unpredictable in its amount: "[b]ecause juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial." *International Brotherhood of Electrical Workers*, 442 U.S. at 50 (citations omitted). The award imposed on appellant was also unpredictable in its occurrence, because it was imposed for conduct that appellant could not have known was wrongful at the time. Appellant could not possibly have predicted that the procedures followed in refusing — reasonably — a $1,650 claim would lead to a $3.5 million damages award, and it will be extremely difficult for appellant or another insurer rationally to take the possibility of such awards into account in the future.

An insurer is in an important sense a trustee for those whom it insures. The insurer's ability to pay meritorious claims is of primary importance to its customers, and an action that undermines its ability rationally to plan to meet its obligations threatens, first and foremost, the security that its customers have sought. This Court has made these precise points on more the one occasion:

> "[I]nsurance[ ] depend[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing * * * insurance funds, like other unforeseen events, can have this effect."

Allied Structural Steel Co., 438 U.S. at 246-247, quoting *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 721 (1978).

C. 1. a. The Contract Clause of the Constitution forbids precisely the action taken by the Alabama Supreme Court — a retrospective imposition of liability that disrupts expectations based on a contract, imposes a harsh burden on a contracting party, and serves no substantial state interest. Article I, Section 10, Clause 1 of the Constitution provides in part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts * * *.

As we have noted, the rights and obligations of appellant and appellees were comprehensively defined by a contract. The Alabama Supreme Court imposed, on that relationship governed by contract, a new duty — not just the duty to process claims in good faith, but an idiosyncratic duty to follow certain procedures. Thus, the action of the Alabama Supreme Court in this case is indistinguishable from the state legislative action that this Court invalidated under the Contract Clause in *Allied Structural Steel Co. v. Spannaus*, *supra*: in addition to "changing the company's obligations in an area where the element of reliance [is] vital" and exceeding the "express terms of the company's contractual obligations" (438 U.S. at 246, 247), the Alabama Supreme Court has "impose[d] a completely un-

expected liability in potentially disabling amounts." *Id.* at 247. "Entering a field it had never before sought to regulate, the [Alabama Supreme Court] grossly distorted the company's existing contractual relationships with its [insureds] by superimposing retroactive obligations upon the company substantially beyond the terms of its [insurance] contracts." *Id.* at 249-250.

Of course, not every state action that impairs or, as in this case, augments the obligations defined by a contract (see *Allied Structural Steel Co.*, 438 U.S. at 244-245 n.16) violates the Contract Clause. See, *e.g.*, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 189-190 (1983). But when, as here, "the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation" (*Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)). Specifically, the state must show that the impairment is both "reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25; see *id.* at 29.

The question whether a measure is "reasonable and necessary" can be resolved only by inquiring into whether the impairment was carefully tailored to serve the state's interest (see *United States Trust Co.*, 431 U.S. at 29-30) and into whether a "less * * * drastic impairment" — that is, a "more moderate course" — would "serve [the state's] purposes equally well" (*id.* at 30-31). As we have explained, a punitive damages remedy is poorly tailored to the promotion of state objectives even when it is only prospectively imposed, because the amount of an award is arbitrarily determined by a jury and is unrelated to any actual injury. A retroactive imposition of punitive damages in the circumstances of this case, as we have shown, serves no discernible state interest whatever. And even if some slight state interest in deterrence is furthered by a retroactive imposition of liability, a punitive damages award of the magnitude at issue here is a singularly *im*moderate means of promoting it. The Court has commented that "the elimination of unforeseen windfall benefits" may be "a reasonable

basis" for altering a contractual obligation (*id.* at 31 n.30, citing, inter alia, *Gelfert v. National City Bank*, 313 U.S. 221, 233-235 (1941); see, *e.g.*, *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965)); here, the court below has altered a contractual obligation in order to *confer* a windfall benefit on a party.

b. We recognize that this Court has said that the Contract Clause "is directed only against impairment by legislation and not by judgments of courts." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924). For several reasons, however, this dictum should not preclude the Court from applying the Contract Clause — or at least the principles underlying the Clause (see pages 27-28, *infra*) — to the action taken by the Alabama Supreme Court in this case.

First, *Tidal Oil* itself and, so far as we can determine, nearly all of the cases on which it relied (see 263 U.S. at 451 n.1) concerned state court decisions construing state statutes. None involved the state action at issue in this case — a *judicially*-created prohibition supported by a punitive remedy.[7] Indeed, subsequent decisions of this Court interpreted *Tidal Oil* to stand for the proposition that "[c]hange by judicial construction *of antecedent legislation* does not impair a con-

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[7]There is ample reason for distinguishing between a judicial decision that changes a court's interpretation of a statute and a decision that imposes a new duty that is wholly created by a court. When a court alters its interpretation of a statute, it is presumed simply to have corrected an erroneous interpretation. In cases like *Tidal Oil*, there is no contention that the statute, correctly interpreted, impaired the obligation of contract; and in an area governed by a statute, a state arguably should not be said to have impaired the obligation of contract when the statute itself, correctly construed, does not constitute such an impairment. The fact that the court did not correctly discern the meaning of the statute on its first attempt is simply an unavoidable incident of the operation of a state government and does not constitute state action of a kind that is capable of impairing a contract. Cf. *James v. United States*, 366 U.S. 213, 247 (1961) (opinion of Harlan, J.).

By contrast, when, as here, the legislature has not acted in an area and the state permits its courts to create new duties, the action of the court *is* the action of the state. There is no reason for saying that that action cannot impair the obligation of a contract.

tract, at least in the forbidden sense" (*Stockholders v. Sterling*, 300 U.S. 175, 182 (1937)(emphasis added)). So understood, *Tidal Oil* is no barrier to the application of the Contract Clause to this case.

Second, *Tidal Oil* emphasized the language of the Contract Clause, which provides that "[n]o State shall * * * pass any * * * Law" impairing the obligation of contracts. But this language can no longer be — if it ever was — a valid basis for confining the Contract Clause to state legislative action. The First Amendment provides that "Congress shall make no law * * *"; that is, the First Amendment not only refers to "law" but, unlike the Contract Clause, specifically refers to the legislative branch of government. Nonetheless, it is well established that the First Amendment applies to judicial decisions. See, *e.g.*, *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Bridges v. California*, 314 U.S. 252 (1941).

In addition, since a state is free to "unite legislative and judicial powers in a single hand" (*Prentis v. Atlantic Coast Line*, 211 U.S. 210, 225 (1908)), there is no reason to attribute to the Framers an intention to draw a sharp distinction between the legislative and judicial branches of a state government. So far as the federal Constitution is concerned, it is difficult to identify a principled basis for distinguishing between state courts — which, of course, are not confined to the limited judicial functions specified in Article III — and state administrative agencies. Cf. *Franchise Tax Board v. United States Postal Service*, No. 83-372 (June 11, 1984), slip op. 8-12. Indeed, the unsoundness of the *Tidal Oil* dictum becomes apparent if one attempts to apply it to state actions that are neither purely legislative nor purely judicial. For instance, a state might permit much of its power to be wielded by a state administrative agency acting under a broad statutory grant of authority or by a state official, such as the governor, exercising inherent powers or powers granted by the state constitution. It is implausible to suppose that a state could, by allocating its authority in this way, circumvent the Contract Clause; but that

is the conclusion to which the reasoning of the *Tidal Oil* dictum leads. The actions of state agencies or officials do not constitute "pass[ing] * * * Law[s]" in the ordinary sense of those terms. The actions of a state agency or official acting under a broad grant of authority often closely resemble in appearance — and, for federal constitutional purposes, are logically indistinguishable from — the decisions of a common law court acting under a grant of general jurisdiction. Since it seems evident that the Contract Clause must apply to the former, it should apply to the latter as well.

Finally, we note that applying the Contract Clause to the decisions of state courts will not threaten to convert every state contract action into a case presenting a federal constitutional claim. Many state statutes affect rights established by contract, but the Court has made it clear that not every such statute raises a substantial federal question. See, *e.g.*, *Allied Structural Steel Co.*, 438 U.S. at 241, quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905). And many other constitutional provisions apply to a broad range of state judicial actions without constantly converting routine state cases into cases raising constitutional issues. For example, not every state court ruling on a procedural issue raises a substantial question under the Due Process Clause; and even though the Court has held that the First Amendment requires exacting scrutiny of damages awards in certain categories of defamation cases, many defamation actions are litigated to a conclusion without raising any serious constitutional issue.

The reason that routine state court decisions dealing with the law of contracts should not give rise to a claim under the Contract Clause is simply that such decisions seldom present a substantial question under Contract Clause doctrine. But if a component of a state government creates a new rule that *does* "impair the obligation of contracts," there is no reason to allow its action to escape scrutiny under the Contract Clause merely because it happens to be a court. In this case and its earlier decisions concerning the tort of bad faith failure to pay an insurance claim, the Alabama Supreme Court functioned much

like a legislature: it considered a broad range of policy considerations and, after due deliberation, it decided to create a new tort and a new remedy. "Legislating" in this way is not necessarily an improper action for a state court; but if it is an action that threatens to impair the obligation of contracts, it should be judged by the same standards that apply to the actions of legislatures.

2. a. Even if the action of the Alabama Supreme Court did not violate the Contract Clause, it violated the Due Process Clause. As we have explained, this Court's decisions (*e.g.*, *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, *supra*; *Usery v. Turner Elkhorn Mining Co.*, *supra*) establish that the Due Process Clause imposes certain requirements on a measure that visits retroactive liability on a person. Specifically, a retrospective measure must promote a legitimate state objective that could not be furthered by a strictly prospective measure, and it cannot be unduly harsh and oppressive. See page 13, *supra*. As we showed in Part B, the decision of the Alabama Supreme Court did not meet these standards.

Pension Benefit Guaranty Corp. and *Turner Elkhorn Mining Corp.* dealt with legislation, but the same standards must necessarily apply to judicial action. "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 680 (1930) (footnote omitted). See also *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948) (citing cases).

b. In a closely related area the Court has, on several occasions, held that the Due Process Clause is violated by a judicial decision to impose liability for conduct that could not reasonably have been considered wrongful at the time it occurred. *Bouie v. City of Columbia*, 378 U.S. 347 (1964), held that the Due Process Clause prohibites a state from convicting a defendant for violating a statute when state courts interpreted the statute in an unforeseeable way to proscribe conduct that was apparently lawful under the terms of the statute. Although the

Ex Post Facto Clause has been held to apply only to the actions of state legislatures, the Court reasoned that "[i]f [the state] had applied to this case [a] new statute prohibiting [the conduct in which the defendants engaged] * * * the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction" (*id.* at 362). See also *Marks v. United States*, 430 U.S. 188, 192 (1977), quoting *Bouie*, 378 U.S. at 353-354:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."

Thus, as these cases hold, the principles of the Ex Post Facto Clause apply to the actions of state courts even though the Clause itself applies only to state legislatures. By analogy, the principles of the Contract Clause must apply, through the Due Process Clause if not directly, to the actions of state courts. The Court has made it clear that the basis of its decision in *Bouie* — the condemnation of the retroactive imposition of liability — is not limited to criminal proceedings:[8] the Court explained that its decision in *Bouie* was mandated by a "basic due process concept" (378 U.S. at 354). For the reasons we have stated, that same concept precludes the irrational and excessively burdensome retroactive punitive damages liability imposed by the Alabama Supreme Court in this case.

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[8]For example, in *Douglas v. Buder*, 412 U.S. 430, 432 (1973), the Court applied the principle of *Bouie* to probation revocation, even though probation revocation is not a criminal proceeding. See, *e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

DAVID A. STRAUSS
1111 East 60th Street
Chicago, Illinois 60637
(312) 962-9494
Counsel of Record

Of Counsel:

DARRELL S. RICHEY
Vice President and General Counsel
Golden Rule Insurance Company
Lawrenceville, Illinois 62439

GUY E. MCGAUGHEY, JR.
McGaughey and McGaughey
Lawrenceville, Illinois 62439

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No. 84-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION, INC.

WILLIAM O. MILLER
G. STEPHEN PARKER*
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

August 1985

**Counsel of Record*

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On Appeal from the Supreme Court of Alabama

BRIEF *AMICUS CURIAE* OF SOUTHEASTERN LEGAL FOUNDATION, INC. IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*

The Southeastern Legal Foundation, Inc. (''Southeastern'') herewith submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief and copies of their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adver-

sarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern represents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Toward that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court over the past nine years, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); and *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), cert. denied,* ____ U.S. ____, 105 S.Ct. 220 (1984.).

As proponents of a free and competitive economic system in which unnecessary governmental regulation is minimized, Southeastern is vitally interested in issues and cases which affect economic conditions, particularly matters arising out of or having a direct impact upon the Southeastern region of the United States. The impact of increasingly large punitive damage awards is felt in all segments of the economy and our society. The costs of such damage awards, borne by the ultimate consumers and purchasers of the product, can have an adverse impact on the ability of businesses to compete and upon the prices charged by these businesses.

For these reasons, there is a strong public interest in ensuring that there is an impartial and thorough judicial review of awards of punitive damages. Because the instant case presents an instance of judicial review so inadequate as to violate due process, Southeastern urges this Court to overturn the judgment of the Alabama Supreme Court.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the

brief on behalf of Appellant, Aetna Life Insurance Company.

SUMMARY OF ARGUMENT

Important public policy questions are raised by this case, in which the Alabama Supreme Court upheld a jury's award of $3.5 million in punitive damages against Appellant. In addition to the public interest in controlling costs of insurance and health care, the citizens of a State are affected by actions of a State's highest court which may have an adverse economic impact within that State.

Under the circumstances of this case the actions of the Alabama Supreme Court in failing to provide meaningful judicial review constituted a deprivation of Appellant's right to due process of law. A major shortcoming in the Court's review process was failure to consider verdicts and settlements in comparable cases.

This case presents an example of why some degree of due process protection should be required for imposition of punitive damages. Although there are sufficient grounds for reversal on well-established legal principles, the case also presents this Court with an opportunity to consider the degree of due process protection which should attach to proceedings in which punitive damages may be imposed.

ARGUMENT

I. INTRODUCTION

In the Jurisdictional Statement filed on behalf of Appellant, and in its brief on the merits, Appellant has eloquently set forth the basis for this Court's jurisdiction and the reasons why this Court should review and overturn the Alabama Supreme Court's decision upholding an award of $3.5 million in punitive damages for wrongful refusal to pay $1,650.22 of a $3,028.25 insurance

claim. In its brief Amicus, Southeastern Legal Foundation will not attempt to restate the arguments advanced by the parties, but, rather, will focus on certain public policy and constitutional questions presented by this case.

Amicus submits that this Court has jurisdiction to consider, individually and collectively, Appellant's contentions, because the case presents serious questions of violation of due process and other constitutional rights. In its consideration of these issues, the Court also has the opportunity to consider several aspects of the impact of the trend toward increasingly large awards of punitive damages on the legal system and upon society in general.

II. THE IMPOSITION OF INCREASINGLY HIGH PUNITIVE DAMAGE AWARDS, AND THE APPROPRIATE RESPONSE OF THE JUDICIAL SYSTEM, PRESENT IMPORTANT QUESTIONS OF PUBLIC POLICY.

It is indisputable that the expanding tort liability of individuals and corporations has had a dramatic impact upon our society. W. Prosser & W. Keeton, *The Law of Torts* § 3 (W. Keeton gen. ed. 5th ed. 1984). In recent years, this general expansion of tort liability has been accompanied by a tendency of courts and juries to grant increasingly large punitive damage awards. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 So.Cal.L.Rev. 133 (1982). Although punitive damages constitute only one facet or aspect of this overall picture, the nature -- and unpredictability -- of punitive damages introduce a major element of uncertainty into many aspects of our business and social lives. Moreover, this risk and uncertainty are factors which may not be insurable. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 71 (1982).

Without belaboring these fairly obvious propositions, Amicus submits that they demonstrate the need for thorough and impartial judicial review in cases involving substantial punitive damage awards.

It is also evident that, in the absence of judicial control over the discretion of juries in awarding punitive damages, drastic and perhaps inappropriate legislative reaction is inevitable. For example, it is reported that newly enacted Illinois legislation limiting medical malpractice claims provides, *inter alia*, for the abolition of punitive damages against physicians or hospitals. Blodgett, *M.D.s Get Well*, 71 A.B.A. Journal 25 (August 1985). The imposition of such limitations appears more likely to occur in the absence of effective judicial review of such damage awards.

The public has an obvious interest in controlling the cost of insurance and health care. The costs of insurance are ultimately passed on to the consumers and purchasers, and an excessive punitive damage award against an insurer thus affects many members of our society. Additionally, to the extent that the State's economic climate is affected by actions of the judicial branch of government, the citizens of the State affected by a judicial determination have a special interest in a case such as the one before this Court.

In urging this Court to consider the social and policy ramifications of the imposition of unrestrained punitive damage awards, Amicus does not ask this Court to infringe upon legislative prerogatives, nor to invade the province of the State courts in determining issues of State law. Although the Alabama Supreme Court's opinion purported to rely upon its own prior decisions setting forth the applicable standards, (App. 34a), the failure to provide meaningful review of the punitive damage award is evident. In reviewing the lower court's award of punitive damages the Alabama Supreme Court found evidence

of "fraud and conspiracy," even though fraud and conspiracy counts initially brought against Appellant were withdrawn. It is also apparent that the Alabama Supreme Court did not consider, or disregarded, other similar Alabama cases in upholding the verdict. Under the circumstances of this case, such refusal by the Alabama appellate court to provide complete review of the punitive damage award has violated Appellant's right to due process of law.

III. THE CONSTITUTIONAL VIOLATIONS PRESENTED BY THIS CASE PROVIDE A BASIS FOR THE COURT TO REVIEW THE ALABAMA SUPREME COURT'S DECISION.

Inadequate appellate review may amount to a constitutional violation of due process when relevant precedent is overlooked or unfounded assumptions are made regarding the trier of fact's deliberations. In addition to this due process violation argument, Appellant may develop the constitutional issues of excessive fines under the Eighth Amendment, impairment of contract in violation of Art. I, § 10, and the disqualification question. Any of these constitutional arguments provide adequate reason for this Court to review the Alabama appellate court's decision.

Under certain circumstances the award of punitive damages is appropriate and just. Judicial review of such awards, while deferential to the jury's decision, must proceed with the awareness that juries are often swayed by emotion. 22 Am.Jur. 2d, *Damages* §264, p. 395 (1965). It is the responsibility of an appellate court to exercise its review authority to determine first, if punitive damages should be awarded, and second, what amount is reasonable to adequately punish the tort-feasor and serve as a deterrent to others.

The Alabama Supreme Court's opinion mechanically

restated the oft repeated appellate standard applied in reviewing punitive damage awards. (App. 33a-34a). When reviewing a punitive damage award to determine if it is excessive, an Alabama appellate court is obligated to consider whether bias, passion, prejudice or any other improper motive has influenced the jury's verdict.

A comparison of similar cases and verdict awards is implicit within an appellate court's examination of the lower court's verdict when considering whether a punitive damage award is excessive. This factor, while not always articulated, is an integral part of the review process. An appellate court does not operate in a vacuum, but is guided by precedent.

An appellate court which reviews a punitive damage award without considering similar previous verdicts is performing an incomplete function. The size of the verdict itself can be a significant factor indicating whether a jury has been influenced by improper motives. If, for example, all prior decisions for wrongful death in a state have consistently been within a reasonable range of each other and then a verdict is rendered which is twice or triple the size of all past verdicts, this is a clear signal that something may be amiss.

An additional factor which should mandate close judicial scrutiny is that the tort of bad faith refusal to settle a first party insurance claim was judicially created in Alabama. *Chavers v. National Sec. Fire & Cas. Co.*, 405 So.2d 1, 6 (Ala. 1981) (*per curiam*) (on application for rehearing). *See* Heninger, *Bad Faith in Alabama: An Infant Tort in Intensive Care*, 34 Ala.L. Rev. 563 (1983). Without the aid or guidance of the State Legislature, the Alabama Supreme Court recognized the existence of this new tort. The legitimacy of the State appellate court's action in recognizing a new tort is not questioned, but the lack of guiding or constraining legislation should cause any appellate court to pause during its consideration of a case ap-

plying the new tort upholding any exceptionally large award.

A. The Alabama Supreme Court's Review Of The Punitive Damage Award Was Incomplete Because Verdicts In Similar Cases Were Ignored And The Court Relied Upon Unfounded Assumptions.

1. The $3.5 million punitive damage award is disproportionate in comparison with other judgments.

The amount of the *Lavoie* punitive damage award is not a gradual or logical step in the continuing evolution of rising punitive damage awards in Alabama; instead, the *Lavoie* award is a radical aberration. Admittedly, a jury is not required to weigh precedent, reason or logic before rendering a verdict which is greater than any previous verdict in a similar case, but a reviewing court cannot act so cavalierly. While ever considerate and respectful of a trier of fact's verdict, an appellate court has a duty to act as a moderating influence where bias, passion or prejudice has influenced the verdict. *Carlisle v. Miller*, 275 Ala. 440, 444, 155 So.2d 689, 692 (1963), *accord Aspinwall v. Gowens*, 405 So.2d 134, 136-137 (Ala. 1981). A verdict awarding punitive damages which is so far in excess of any similar case indicates that the trier of fact's verdict was based upon bias, passion, prejudice or some other improper motive and is excessive. 2 S. Speiser, *Recovery For Wrongful Death*, § 9.4 (1975), [citing *Alabama Power Co. v. Smith*, 273 Ala. 509, 142 So.2d 228 (1962)].

In comparison, the Alabama Supreme Court's decision upholding the award of $3.5 million in punitive damages exceeds the national average award for the wrongful death of an adult male by more than $2.5 million. *1 Personal Injury Valuation Handbooks*, Current Award Trends, No. 292, p. 10 (1985). This discrepancy between the amount of punitive damages

awarded in most wrongful death actions and a bad faith refusal to settle a first party insurance claim suggests that it is a more serious offense in Alabama for an insurance company not to pay one of its insured's claims, than it would be to cause the wrongful death of that insured.

In a recent case, a U.S. District Court in Alabama reduced a wrongful death judgment from $2,000,000.00 to $1,250,000.00. In so doing the court considered whether the award of $2,000,0000.00 was excessive under Alabama law. *Walden v. United States Steel Corp.*, 567 F.Supp. 1443 (N.D. Ala. 1983), *aff'd in part,* 759 F.2d 834 (11th Cir. 1984). Alabama law only permits punitive damages to be awarded in a wrongful death action pursuant to the Alabama Homicide Act, Ala. Code § 6-5-410 (1975), and no compensatory damages are permitted. *Carter v. City of Birmingham,* 444 So.2d 373 (Ala. 1983). The *Walden* court began its examination of the verdict by acknowledging that, "the only measure of damages for wrongful death in Alabama is: 'What does it take adequately to punish the tort-feasor considering the extent and quality of the wrong committed?' " *Walden,* 567 F.Supp. at 1452. In addition to considering whether the verdict of punitive damages has punished the tort-feasor, the court may also examine how much was claimed in the *ad damnum* of the complaint and other comparable recent decisions. *Id.* The *Walden* court stated, "[t]his Court has examined numerous recent death verdicts and settlements in Alabama. A verdict of $1,250,000.00 would be in the upper range." *Id.*

In *Aspinwall v. Gowens,* 405 So.2d 134 (Ala. 1981), the plaintiff was awarded $1 million in punitive damages in a fraud suit against the insurer for wrongful refusal to pay a medical insurance policy claim of $2,702.80. On appeal the Alabama Supreme Court affirmed the judgment of the trial court on the fraud count, but also found the punitive damage award to be

excessive. The court issued an order of remittitur reducing the verdict by $750,000.

Dempsey v. Auto Owners Insurance Co., 717 F.2d 556 (11th Cir. 1983), was, like the instant case, an action for wrongful refusal to pay an insurance claim in which the Court of Appeals, applying Alabama law, found an award of $3.1 million in punitive damages to be excessive. The Court remanded the case to the trial court to require remittitur in the amount of $1.5 million as a condition to the denial of a motion for new trial. *Id.* at 562.

The *Dempsey* court set forth the criteria for appellate review of a punitive damage award as follows, "[t]he court should reduce a verdict which is not merely overly generous, but so excessive that it demonstrates 'bias, passion, prejudice, corruption or other improper motives or causes.' " *Id.* The Eleventh Circuit concluded that, while an award of punitive damages was appropriate, the sum of $3.1 million was "generous . . . excessive . . . based in part on bias, passion or other improper causes." *Id.* Accordingly, the trial court should have taken appropriate corrective action. *Sub judice*, similar conclusions could be reached based upon an examination of the facts of the instant case.

$3.5 million is $2 million greater than any comparable verdict in an Alabama bad faith refusal-to-pay case. The *Lavoie* verdict is also more than $2.5 million greater than the average verdict awarded for the wrongful death of an adult male in 1984. Surely human life is more valuable than any wrongful refusal to make an insurance payment, no matter how egregious the circumstances. These facts indicate that the Alabama appellate court has ignored established local precedent and upheld an unsupportable verdict.

2. When examining the lower court's award of punitive damages, the Alabama Supreme Court relied heavily on evidence of fraud and conspiracy, even though fraud and conspiracy counts had been withdrawn.

In its opinion the Alabama Supreme Court declared that it upheld the award of $3.5 million in punitive damages because "[t]he plaintiffs were able to show that the dark shadows of fraud and conspiracy enveloped each and every aspect of Aetna's actions regarding the handling of the Lavoie claim from the instance of the first denial and continued throughout the trial itself." (App. 35a). Next, the court offers a summation of the evidence presented to the jury "from which a jury could not only impute an intent to injure, but could hardly ignore it . . . [and] an open court demonstration of fraud on the part of Aetna in an effort to avoid liability...." *Id.* If the Plaintiffs really had such strong evidence of fraud and conspiracy, as the appellate court asserts in its opinion, it appears inexplicable that the Plaintiffs should have withdrawn their fraud and conspiracy counts in the case. (Jurisdictional Statement, p. 28). These actions seriously undermine the reliance by the appellate court on proof of fraud and conspiracy, and lend support to Appellant's arguments that their rights were violated. Because there was no issue submitted to the jury regarding fraud and conspiracy, the State appellate court's complete reliance upon this factor raises a serious question as to whether its review was sufficient.

IV. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CONSIDER THE DEGREE OF DUE PROCESS PROTECTION REQUIRED FOR IMPOSITION OF PUNITIVE DAMAGES.

Initially, it should be stated that for this Court to hold that Appellant's constitutional rights were violated in this case would not, by itself, create any new set of requirements for review

of punitive damage awards in the State and Federal courts. For reasons stated above, the facts of this case, taken by themselves, demonstrate a denial of Appellant's constitutional rights in a number of respects. Such a holding by the Court would simply be a recognition that there were constitutional violations present under the unusual circumstances of this case. Whether additional due process requirements were necessary because of imposition of punitive damages could await subsequent cases for resolution. Nevertheless, the case presents an opportunity for the Court to consider the question of whether imposition of punitive damages requires some degree of due process protection.

The debate over the propriety, wisdom and appropriateness of punitive damages has surfaced in this Court on several occasions. A recent example was the Court's consideration of whether punitive damages could be imposed under 42 U.S.C. § 1983 for conduct by a defendant which constituted "reckless or callous disregard of or indifference to, the rights or safety of others," without a finding of bad faith or improper motive. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). In a dissent from the majority's view that such damages could be imposed, Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, considered the function of punitive damages, and observed that the ill-defined standards for imposition of punitive damages tended to defeat some of the underlying purposes for punitive damages. *Id.* at 45, 103 S.Ct. at 1642. The case *sub judice*, in which the conduct constituting the basis for a punitive damage award occurred prior to the Alabama Supreme Court's determination that such recovery was possible, is a clear example of the failure of the deterrence rationale.

This Court has considered the arbitrary nature of punitive damages in a variety of other situations. In holding that municipalities were immune from imposition of punitive damages under 42 U.S.C. § 1983, the Court recognized the

broad discretion "traditionally accorded to juries in assessing the amount of punitive damages." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 2761-62, 69 L.Ed.2d 616 (1981). In addition to numerous other reasons for concluding that municipalities were immune from punitive damages under 42 U.S.C. § 1983, the *City of Newport* case pointed to the perception of unlimited taxing power of a municipality which could encourage a jury to impose sizeable awards. *Id.* at 270, 101 S.Ct. at 2761. Amicus submits that the presence of a large and well-known corporate defendent, such as an insurance company, could have the same prejudicial impact on the jury.

This Court has also noted the fact that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). The possibility that punitive damages could be employed to punish unpopular viewpoints or unpopular defendents has been recognized by this Court. *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50, n.14, 99 S.Ct. 2121, 2127, n. 14, 60 L.Ed2d 698 (1979); *International Union et al. v. Russell*, 356 U.S. 634, 651, 78 S.Ct. 932, 942, 2 L.Ed.2d 1030 (1958) (Warren, C.J. dissenting).

To this point, most cases have rejected any requirement that due process safeguards be applied to the imposition of punitive damages. *E.g., Curtis Publishing Company v. Butts*, 388 U.S. 130, 160, 87 S.Ct. 1975, 1994-95, 18 L.Ed.2d 1094 (1967). A fundamental basis for rejecting such due process requirements, however, is that adequate appellate supervision of the amounts of punitive damages awarded serves as a balance against undue bias or prejudice which may be a factor in such awards. *Id.* at 160, 87 S.Ct. at 1994. *Sub judice*, the absence of adequate judicial scrutiny of an extraordinarily high punitive

damage award tends to refute the argument that due process protections are unnecessary.

One commentator has strongly suggested that the time has come for a reconsideration of traditional attitudes toward the role of punitive damages in our legal system. Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269 (1983). Wheeler maintains, *inter alia*, that the evolution of the requirements of the Due Process Clauses of the Fifth and Fourteenth Amendments furnishes support for the argument that some degree of due process protection should be accorded defendants against whom punitive damages are sought. *Id.* at 273.

In *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), this court set down several key factors in determining whether due process was being satisfied. These factors should be reviewed in light of the current case. In *Mathews*, the court stated that the "degree of potential deprivation is a factor to be considered in assessing the validity of any...decisionmaking process." *Id.* at 341, 96 S.Ct. at 906. Thus, in the punitive damages context, the amount of the award and the procedure for judicial review are fundamental to due process.

Applying the due process standards of *Mathews*, the Alabama Supreme Court's decision did not measure up. In the court's opinion no mention whatever is made that the judgment rendered might be too large. The court instead only gives reasons as to why the jury could hold the Appellant liable. (App. 33a-36a). The risk of error warned about in *Mathews* - "the risk of erroneous deprivation" - was not properly guarded against in the "decisionmaking" and appellate process. To protect the defendant against the "degree of...deprivation," the court should have examined and justified the *amount* of the award.

This court is thus presented with yet another opportunity to consider the role of punitive damages in our legal system, and to examine the record in this case, which strongly suggests a need for additional judicial control over the discretion of juries in awarding punitive damages.

CONCLUSION

For the foregoing reasons Southeastern respectfully urges this Court to reverse the judgment of the Alabama Supreme Court.

Respectfully submitted,

WILLIAM O. MILLER
G. STEPHEN PARKER *
ROBERT B. BAKER, JR.

SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Road
Building 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Amicus Curiae
Southeastern Legal Foundation, Inc.

* *Counsel of Record*

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No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE and
ROGER J. LAVOIE, SR.,
Appellees.

ON APPEAL
FROM THE SUPREME COURT OF ALABAMA

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, AND BRIEF OF AMICI CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

ARTHUR E. SCHWIMMER
Suite 1800
2049 Century Park East
Los Angeles, California 90067
(213) 277-8448
Attorney for Amici Curiae

August 2, 1985

Lawyer's Brief Service, Inc. / Legal Publishers / (213) 383-4457

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No. 84-1601

IN THE
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October Term, 1984

AETNA LIFE INSURANCE CO.,
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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, AND BRIEF OF AMICI CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California hereby respectfully move for leave to file the attached brief amici curiae in this case. The consent of the attorney for the appellant has been obtained and is being

filed with the Court. The consent of the attorney for the appellees was requested but refused.

The two proposed amici together represent approximately 2,800 attorneys throughout California who regularly represent the interests of defendants in tort litigation, frequently having been retained by the defendant's insurer. The two organizations, and their members' clients, are vitally interested in the question whether a state may constitutionally impose a penalty, essentially unrelated to the substantiality of the issues, based upon the exercise by a judgment debtor of its statutory right of appeal.

In the present case the constitutionality of Alabama's automatic penalty for losing an appeal was raised in the Alabama Supreme Court and in appellant's jurisdictional statement in this Court. Appellant, however, challenges the statute solely on Equal Protection grounds. This Court should be aware of, and may wish to consider, an equally significant constitutional problem: the seriously chilling effect of the statute on the exercise of a judgment debtor's First Amendment right to petition for redress of grievances by filing and prosecuting an appeal. If this First Amendment argument is accepted, it will be dispositive of the issue of the validity of the statute.

Respectfully submitted,

ARTHUR E. SCHWIMMER
Attorney for Association of
Southern California Defense
Counsel and Association of
Defense Counsel of Northern
California

August 2, 1985

No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE and
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BRIEF OF AMICI CURIAE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

The Association of Southern California Defense Counsel and Association of Defense Counsel of Northern California together represent approximately 2,800 attorneys throughout California who regularly represent the interests of defendants in tort litigation, frequently having been retained by the defendant's insurer. The two organizations, and their members' clients, are vitally interested in the question

whether a state may constitutionally impose a penalty, essentially unrelated to the substantiality of the issues, based upon the exercise by a judgment debtor of its statutory right of appeal.

SUMMARY OF ARGUMENT

One of the fundamental rights protected by the First Amendment is that of access to the courts. Alabama grants litigants the right to appeal from adverse judgments, but automatically imposes a 10 percent penalty against persons who appeal from an adverse *money* judgment and lose, regardless of the substantiality of the issues presented. That penalty has a seriously chilling effect on legitimate appeals by judgment debtors and, by reducing the number of appeals brought by a major class of litigants, defeats the institutional purposes of the appellate courts. Accordingly, the statute violates the First Amendment.

ARGUMENT

SECTION 12-22-72 OF THE CODE OF ALABAMA HAS A CHILLING EFFECT ON LEGITIMATE APPEALS AND THEREBY VIOLATES THE RIGHT OF ACCESS TO THE COURTS INHERENT IN THE FIRST AMENDMENT RIGHT TO PETITION FOR REDRESS OF GRIEVANCES.

The Supreme Court of Alabama has affirmed a judgment of $3,501,650 against appellant Aetna Insurance Co. ("Aetna"). App. A, pp. 1a, 40a. Pursuant to section 12-22-

72, Code of Alabama (1975)[1], "10 percent damages", or $350,165, will automatically be added to this judgment, solely because Aetna lost its appeal. Appellees suggest the purpose of the Alabama legislature in enacting this statute was to discourage frivolous or dilatory appeals, and to provide additional damages to successful plaintiffs for delay in obtaining satisfaction of their judgments. Motion To Dismiss, pp. 18, 19. But the statute requires no individualized determination of the frivolity of the particular appeal for which the penalty is imposed; deterrence against frivolous and dilatory appeals is specifically provided by Rule 38, Alabama Rules of Appellate Procedure (appellate court may award damages for such appeals); and Alabama's provision for 12% interest on an unsatisfied judgment pending appeal (Section 8-8-10, Code of Alabama (1975); Rule 37, Alabama Rules of Appellate Procedure) already compensates for plaintiffs' delay in collection. The penalty of section 12-22-72 is thus imposed simply for losing, nothing more.[2]

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[1] "When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . ."

[2] The notion that Aetna should have raised the question of the validity of the statute in its initial briefs to the Alabama Supreme Court ignores reality. No appellant's counsel would desire to send such a signal of expected defeat on the merits. Further, in view of the Alabama Supreme Court's frequent consideration of issues pertaining to section 12-22-72 on proceedings after decision on the merits (see Jurisdictional Statement, pp. 11-12; Reply Memorandum, pp. 3-4), this Court should not hold that Aetna's presentation of the constitutional issue was untimely.

Quite apart from the violation of equal protection inherent in the statute, Alabama's penalty on unsuccessful appeals by judgment debtors runs afoul of the First Amendment's guarantee of the right to petition the government for a redress of grievances. This Court has stressed that the right of access to the courts is one aspect of the right of petition, and this is true even where the suit is between private parties. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 76 L.Ed.2d 277, 288 (employer's state court suit against employees); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (private antitrust suit); see *Sure-Tan, Inc. v. NLRB*, __U.S__, 81 L.Ed.2d 732, 746.

As recognized in *Bill Johnson's Restaurants, Inc. v. NLRB, supra*, 76 L.Ed.2d at 290, "The right to litigate is an important one . . . ." Accordingly, a state, like the NLRB in that case, "must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary." *Id.* at 291. While a party may be penalized if its position is "plainly foreclosed as a matter of law or is otherwise frivolous," the First Amendment protection must be afforded if there is "any realistic chance" that the parties' "legal theory might be adopted." *Ibid.* Cf. *Lindsey v. Normet*, 405 U.S. 56, 77-79 (automatic doubling of bond on appeal in certain cases, even where appeal is not frivolous, violates equal protection). That Aetna's appeal in the present case unquestionably was *not* frivolous is underscored by the Alabama Supreme Court's 5-4 decision.

Any statute which even indirectly inhibits the exercise of the right to petition is invalid. As held in *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222:

> "The First Amendment would, however, be a hollow promise if it left government free to

> destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil. [Citations.]"

Thus, having afforded litigants the right of appeal,[3] Alabama cannot properly inhibit the exercise of that right by appellants who raise nonfrivolous issues, even if the means it chooses also deters some frivolous appeals.[4]

Section 12-22-72 violates these principles. The statute necessarily has a seriously chilling effect on the prosecution of appeals by those against whom money judgments have been entered. A party against whom a substantial money judgment is entered must consider that, however potentially meritorious the issues it wishes to present to an appellate court, if it fails to persuade a majority of the justices it will be penalized severely for its efforts. Indeed, where (as in the present case) the excessiveness of the damage award is one of the issues to be raised on appeal, the prospect of paying an additional ten percent of the judgment (in addition to interest and costs) if one loses the appeal will effectively deter a substantial number of judgment debtors with

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[3] An appeal is a classic example of a petition for redress of grievances against the government, namely the judiciary, since the appellant must argue that it did not receive a fair and proper trial in the lower court, the governmental entity which entered judgment against it.

[4] As indicated above, frivolous appeals can be penalized under Rule 38, Alabama Rules of Appellate Procedure.

legitimate grievances from pursuing their appellate remedies; the greater the harm done by the trial court or jury, the greater is the monetary risk in pursuing the appeal.

From an institutional perspective, public policy considerations militate against upholding a statute which so profoundly inhibits access to the appellate courts for judgment debtors, a major class of litigants. In our system of government, the appellate courts provide a major forum for the exchange of views on matters of public importance and exercise a powerful voice in shaping the law. They are unquestionably a vitally important forum for the resolution of issues of public policy.

> "Appellate courts serve two quite different functions: First, appellate courts review the trial record for error in the particular case. We can call this the review for correctness. Second, appellate courts use the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them. We can call the second set of tasks the institutional functions—the business of Government." (Hufstedler, *New Blocks For Old Pyramids: Reshaping The Judicial System*, 44 S.Cal.L.Rev. 901, 906-907 (1971).)

Of particular significance to this case is the appellate courts' responsibility for shaping common law principles in the field of tort law, although all areas of the law necessarily are affected. Unlike the executive and legislative branches, the appellate courts cannot initiate action but must wait for litigants to request appellate review. To the

extent the Alabama statute inhibits the exercise of the right of appeal by judgment debtors, the cases and issues brought to the appellate courts will be only those presented by plaintiffs. The appellate courts cannot perform their important institutional function without a steady flow of appeals initiated by all sides. They should hear from defendants as regularly as they do from plaintiffs. Only through such free access to the appellate courts can our system of jurisprudence remain effective.

CONCLUSION

If a nonfrivolous appeal can be subjected to an automatic penalty simply because it was not successful, the rights of potential appellants will be seriously chilled.

The "10 percent damages" provision of section 12-22-72 of the Code of Alabama should be declared unconstitutional, and the judgment, if not otherwise reversed on Aetna's appeal, should be entered accordingly.

Respectfully submitted,

ARTHUR E. SCHWIMMER
Attorney for Amici Curiae
Association of Southern
California Defense Counsel
and Association of Defense
Counsel of Northern California

August 2, 1985

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, August 2, 1985, I served the within MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF in re: "Aetna Life Insurance Co. vs. Margaret W. Lavoie and Roger J. Lavoie, Sr." in the United States Supreme Court, October Term, 1984, No. 84-1601;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

THEODORE B. OLSON; JOHN J. SWENSON; LARRY L. SIMMS; GIBSON, DUNN & CRUTCHER; 1050 Connecticut Ave., N.W., Washington, D.C. 20036;

PETER V. SINTZ: WILLIAM M. CUNNINGHAM, JR.; SINTZ, PIKE, CAMPBELL & DUKE; 3763 Professional Parkway, Mobile, Alabama 36609;

JACK N. GOODMAN; JOHN A. RITCHIE; ELIZABETH A. FERRELL; PIERSON, BALL & DOWD; 1200 - 18th Street, N.W., Washington, D.C. 20036;

ALVIN T. PRESTWOOD; Suite 209, One Court Square, Montgomery, Alabama 36104;

JOSEPH M. BROWN, JR.: CUNNINGHAM, BOUNDS, YANCE, CROWDER & BROWN; 1601 Dauphin St., Mobile, Alabama 36660;

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on August 2, 1985
at Los Angeles, California.

Kathleen Kaltenbach

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 84-1601

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF APPELLANT

Of Counsel:
JACK H. BLAINE
Vice President, State Relations, and General Counsel
EDWARD J. ZIMMERMAN
Senior Associate General Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1850 K Street, N.W.
Washington, D.C. 20006-2284
(202) 862-4000

JOE W. PEEL
Vice President and General Counsel
JOHN P. DINEEN
Assistant General Counsel
HEALTH INSURANCE ASSOCIATION OF AMERICA
919 Third Avenue
28th Floor
New York, New York 10022
(212) 486-5578

ERWIN N. GRISWOLD
(Counsel of Record)
THOMAS F. CULLEN, JR.
PATRICIA A. DUNN
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939

Counsel for Amici

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1601

AETNA LIFE INSURANCE CO.,
Appellant,

v.

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF APPELLANT

INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, representing the interests of 627 member life insurance companies including most of the major life insurers in the country. The Council's members currently hold ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The Health Insurance Association of America ("HIAA") represents the interests of 327 member companies which write over eighty-five percent of the health

[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

insurance written by insurance companies in the United States, and the combined memberships of the HIAA and the Council represent over ninety percent of the health insurance written by insurance companies in the United States.

The opinion of the Supreme Court of Alabama below is important to members of the Council and the HIAA because it enlarges the contract liability of insurers by exposing them to open-ended punitive damages. A new tort cause of action has been grafted onto Alabama insurance contracts which greatly enhances the legal and actuarial liabilities of the members of the Council and the HIAA. As with any form of insurance, a predictable allocation of risks and costs, based upon historical patterns of claim payments, is essential to the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events, such as death or illness. Virtually all insurance companies, including members of the Council and the HIAA, enter into contracts of insurance, establish claim procedures and remedies, calculate premiums and establish reserves in reliance upon these risk allocations. Because the opinion below creates the possibility that contractual remedies may be wholly abrogated by the unpredictable creation of an amorphous new tort cause of action, and that the partial payment or nonpayment of an insurance claim may be accompanied by a substantial, yet unpredictable, punitive award, the stability of the insurance industry in general, and of insurance companies in particular, is seriously threatened. Members of the Council and the HIAA will be forced to incur the increased costs of defending against a proliferation of "bad faith" claims seeking punitive relief, and of making payment of unmeritorious claims to avoid such actions in the future. Faced with large and unpredictable punitive awards—awards not anticipated in the contractual scheme of the insurer-insured relationship—members of the Council and the HIAA may be unable to provide affordable policies of insurance, or, in certain circumstances, to provide such policies at all due to the increased liabilities associated with them. The problems posed by the decision below are serious ones for the companies that sell, and for the people who buy, insurance. The Council and the HIAA thus have a direct and immediate interest in the issues presented in this case.

STATEMENT [2]

Appellees were insured beneficiaries of a group policy of health insurance issued by Aetna Life Insurance Company ("Aetna"), the appellant herein, to the City of Mobile, Alabama. On February 3, 1977, appellee Margaret W. Lavoie was admitted to the Mobile Infirmary Hospital, apparently because of back pains and osteoarthritis. During her twenty-three day stay at the hospital, her doctors conducted extensive diagnostic testing. Her discharge diagnosis was "Osteoarthritis: Mild Psychophysiologic reaction manifested by abdominal pain." Jurisdictional Statement, App. A at 4a.

Appellees filed a claim under the group policy issued by Aetna for an amount totaling $3,028.25. On June 3, 1977, Aetna paid to appellees, the attending physician and the hospital a total of $1,579.74. Pursuant to the terms of the policy of insurance, Aetna declined to pay for various other charges, including some of the diagnostic tests, on the basis that these charges were incurred for care and services not necessary for treatment of the disease involved. The stipulated amount of the charges which Aetna declined to pay is $1,650.22. Aetna again declined to pay the remainder of the claim on November 14, 1977, December 23, 1977 and August 3, 1978.

The Proceedings Below

Appellees filed suit against Aetna alleging, *inter alia*, breach of contract and bad faith failure to pay an insurance claim, and seeking compensatory and punitive damages. Because the State of Alabama did not recognize a cause of action for "bad faith," the action was dismissed. On August 31, 1979, the Supreme Court of Alabama reversed, stating that a cause of action for bad faith failure to pay an insurance claim had been "neither accepted nor rejected" in Alabama. *Lavoie v. Aetna*

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[2] This brief omits references to the reports of the opinions below, a statement of the grounds of jurisdiction, a recitation of constitutional provisions involved, and the questions presented, and adopts the statements in Appellant's brief on these subjects.

Life & Casualty Co., 374 So. 2d 310, 311 (Ala. 1979). Upon remand, the Circuit Court of Mobile County granted Aetna's motion for summary judgment on the "bad faith" claim.

In a trilogy of cases handed down by the Alabama Supreme Court on October 2, 1981, the Court changed the law of Alabama—introducing not only a "bad faith" cause of action,[3] but also the amorphous doctrine of punitive damages in such actions,[4] and set the stage for this appeal. In light of these decisions, the Supreme Court of Alabama reversed the Circuit Court's decision granting summary judgment to Aetna on the "bad faith" claim, and again remanded to the Circuit Court. *Lavoie v. Aetna Life & Casualty Co.*, 405 So. 2d 17, 18 (1981).

On November 4, 1982, a jury returned a verdict against Aetna in favor of appellees, awarding $1,650.22 in compensatory damages and $3.5 million in punitive damages. On December 7, 1984, the Supreme Court of Alabama affirmed the award, departing from its own precedents and again enlarging the new tort. The Court held that a plaintiff need not be entitled to judgment as a matter of law on the contract claim in order for the bad faith action to go to the jury,[5] and that partial payment of a claim would not defeat a bad faith action.[6] This broadening departure from existing precedent was announced in an opinion joined by five justices. Four justices dissented. On December 21, 1984, Aetna filed an Application for Rehearing.

While Aetna's Application for Rehearing was pending, Aetna learned that Justice Embry—the justice who wrote the

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[3] *Chavers v. National Security Fire & Casualty Co.*, 405 So. 2d 1 (Ala. 1981).

[4] *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So. 2d 916, 925 (Ala. 1981).

[5] In 1982, the Alabama Supreme Court in *National Savings Life Insurance Co. v. Dutton*, 419 So. 2d 1357, 1362 (Ala. 1982), held that, as a general rule, a bad faith claim was not cognizable unless a plaintiff was "entitled to recover on the contract claim as a matter of law."

[6] In *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179, 186 (Ala. 1982), the Alabama Supreme Court had reaffirmed its position that partial payment of a claim would generally defeat the issue of bad faith refusal to pay. *See also Sexton v. Liberty National Life Insurance Co.*, 405 So. 2d 18 (1981).

December 7, 1984 majority decision—had, less than a year before rendering his decision in this case, filed suit against Blue Cross-Blue Shield of Alabama ("Blue Cross"), alleging bad faith failure to pay an insurance claim and seeking punitive damages. On February 21, 1985, Aetna filed motions seeking to disqualify Justice Embry from rendering any decision on Aetna's Application for Rehearing, requesting the other justices to disqualify themselves, and seeking withdrawal of the December 7, 1984 decision. On March 8, 1985, Aetna's disqualification motion was denied with each justice determining individually that he would not recuse himself. Aetna's Application for Rehearing was also overruled. Justice Embry participated in these decisions.

On March 22, 1985, Aetna renewed its challenge to Justice Embry's participation in the decisions below, and moved again for his disqualification. On March 25, 1985, the motion was denied. Justice Embry again participated in the decision.

SUMMARY OF ARGUMENT

I. Judge-made law, like legislation, can unravel a pre-existing contract and frustrate constitutionally protected interests in the protections of that contract. *See Lemon v. Kurtzman,* 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). As all insurers do, Aetna entered into an insurance contract based upon the liabilities it assumed and the actuarial incidence of those liabilities. Insurance cannot work any other way. The decision below introduces a liability which is not only new, but completely unpredictable and open-ended. By this decision, Alabama denies Aetna "the stability of contractual obligations" which the Contract Clause guarantees. *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1, 15 (1977). The essential stability is no less undermined by nine officials in court than by a legislature in session. This Court should not apply *Tidal Oil Company v. Flanagan,* 263 U.S. 444 (1924), a case whose jurisprudential basis is now recognized to be unrealistic and outmoded, to deny the necessary relief.

II. The award of punitive damages below—more than 2,100 times the actual damages in a case which did not involve

invasion of any basic right or imposition of any severe or continuing injury—was imposed without any coherent substantive standards and without any particular procedural safeguards to ensure that the award was rational, fair, or based upon intelligible standards. This offends both due process and the Eighth Amendment prohibition against excessive fines. It is clear that the award was punishment—and very serious punishment indeed. It is also clear that any criminal defendant faced with a $100 misdemeanor, and any jury charged with imposing it, would have been provided clearer standards and more exacting guidance than that provided to Aetna and the jury below. "Bad faith" and the distinctions between negligence and malice are concepts too blurry to support the huge and unpredictable range of results available to juries. The result reflected in the verdict below demonstrates all too clearly the imprecision in asking juries to draw such distinctions. A higher standard of proof, and a clearer definition of the predicate conduct, are required, at the very least, to restore a semblance of due process.

The award of $3.5 million itself violates the Eighth Amendment as well because it is grossly disproportionate to the offense charged. Punitive damages are civil fines with penal purposes, and, as punishment, the basic Eighth Amendment principle of proportionality should apply to them. This principle, which has been applied since the Magna Carta, is, like other legal principles here, a bulwark against arbitrariness and jury passion. The " 'parallel limitations' on bail, fines, and other punishments", *Solem v. Helm*, 463 U.S. 277, 289 (1983), embodied in the Eighth Amendment should apply to an exaction that operates as a fine. That the jury exacted a fine without the support of either a criminal finding or the limits of a criminal statute should argue for, rather than against, relief.

Although the Eighth Amendment has yet to be applied in a punitive damages case, the time is now ripe. The proliferation of punitive awards, the meaningless standards, the profligacy of the amounts assessed all demonstrate that there is no rational or reliable jurisprudence to be applied here if the Due Process Clause and the Eighth Amendment are not. Punitive damages become a windfall for the plaintiff, and a spring-gun in the

woods—a random, cruel surprise—for defendants. Punitive damages should not continue to enjoy an immunity from constitutional scrutiny.

ARGUMENT

I. THE CREATION OF A NEW TORT CAUSE OF ACTION RETROACTIVELY APPLICABLE TO EXISTING CONTRACTS CONSTITUTES AN IMPAIRMENT OF CONTRACTUAL OBLIGATIONS IN CONTRAVENTION OF THE CONTRACT CLAUSE

If the Alabama legislature had passed a statute altering the remedial scheme embodied in contracts of insurance in Alabama by creating a new tort cause of action which was retroactively applicable to those existing contracts, there would be no doubt that the state had violated the Contract Clause of the United States Constitution. *See Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, *reh'g denied,* 439 U.S. 886 (1978); *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1 (1977). The mere fact that the unanticipated creation of new contractual liabilities, under the guise of the tort of bad faith, was the product of judicial legislation, as opposed to statutory enactment, should not shield this action from constitutional scrutiny.

Judges as well as legislators make law, and judge-made laws, like statutes, engender constitutionally protected reliance interests. That judges *make* law has been expressly acknowledged by this Court in a series of recent decisions which recognize a doctrine of nonretroactivity in cases where unanticipated federal judicial rulings would upset well-founded reliance interests. *See, e.g., Arizona Governing Committee v. Norris,* 463 U.S. 1073 (1983); *Hill v. Stone,* 421 U.S. 289, *reh'g denied,* 422 U.S. 1029 (1975); *Lemon v. Kurtzman,* 411 U.S. 192 (1973); *Chevron Oil Co v. Huson,* 404 U.S. 97 (1971); *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970); *Cipriano v. City of Houma,* 395 U.S. 701 (1969). In these cases, the Court recognized the "fact of legal life" that judges, as well as state legislators, make law and that "even judge-made rules of law

are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman,* 411 U.S. at 199 (1973).[7] Thus, when this Court determines whether to apply a constitutional decision retroactively, it now engages in a "process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." *Lemon,* 411 U.S. at 198.[8] Implicit in this process is a recognition by this Court that these reliance interests can themselves reach constitutional proportions, and cannot be swept away with the old rule of law.

The reliance interests of Aetna in particular and of insurers in general who contract to provide insurance in Alabama are significant. As this Court recognized in *Allied Structural Steel Co. v. Spannaus,* 438 U.S. at 246-47, reliance interests are particularly strong in the business of insurance. Insurance is essentially a system of private ordering—the consensual establishment of legal rights and obligations between parties. As with any contract, insurance contracts cannot be repugnant to law, and the system of law existing at the time of the contract supplements, without impairing, this consensual relationship.

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[7] The need for judicial accountability to constitutional standards when judges are making law—particularly laws which have broad impact through retroactive as well as prospective application—is dramatically illustrated by this case. The substance of the rule applied will virtually always be easier to assess than the interest of the tribunal. A reviewing court can focus upon substantive and meaningful standards in making law to ensure that constitutional interests are protected, and absolve itself generally of review of the judicial processes of state tribunals. This approach allows this Court to face substantial constitutional issues, to decide cases with resort to traditional substantive principles, and to avoid making *ad hoc,* and sometimes difficult, decisions of judicial ethics. For insurers, like Aetna, who do business in Alabama, reliable protection against encroachment upon constitutional rights must come from adherence to general constitutional standards, and not from after-the-fact scrutiny of the bias and interests of a particular tribunal.

[8] *See also Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). In *Chevron,* this Court articulated a three-part test, which has been followed in subsequent cases, to determine when the doctrine of nonretroactivity will apply: (1) whether the new decision is a clear break from prior law which was not foreshadowed; (2) whether retroactive effect is necessary for the operation of the new principles announced; and (3) whether substantial inequity would result from a retroactive application. *Id.* at 106-108.

Thus, cognizant of the laws of the states in which they contract to provide insurance, insurers like Aetna assess their potential liabilities, calculate premiums, allocate reserves, and enter into contracts of insurance.

In this case, Aetna, an out-of-state insurer, entered into a contract of insurance with the City of Mobile in 1967. That contract was made by Aetna with knowledge of its obligations under Alabama's pervasive insurance laws,[9] and with awareness of the decisions of the Alabama courts interpreting those laws. This contract, like any other contract in Alabama, was subject to the general rule that no punitive damages may be awarded in contract actions.[10]

In a series of decisions in 1981—fourteen years after Aetna had contracted to provide insurance to the City of Mobile—the Supreme Court of Alabama drastically upset the reliance interests of Aetna by legislating an entirely new tort cause of action which it retroactively applied in 1984 to Aetna's 1967 contract of insurance. Significantly, the Alabama Supreme Court was not reinterpreting existing laws or decisions when it ruled that a cause of action for bad faith failure to pay an insurance claim existed in Alabama. Instead, it created an entirely new remedy enormously increasing the potential liability for breach of contract—a remedy which had not previously existed in Alabama—and labeled it as the tort of "bad faith." By so doing, the Alabama Supreme Court abrogated the consensual arrangement between Aetna and the City of Mobile, and imposed upon Aetna a $3.5 million liability which could not have been anticipated at the time of contracting.

The impact of abrogating these reliance interests is severe, and completely at odds with the central concern of the Contract

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[9] Insurance companies, and contracts of insurance, are subject to comprehensive regulation in Alabama. Indeed, the Alabama Insurance Code occupies nearly an entire volume of the Code of Alabama, and consists of 40 chapters regulating insurance in general as well as specific types of insurance. *See* Ala. Code §§ 27-1 through 27-40 (1975).

[10] *See, e.g., Wood v. Citronelle-Mobile Gathering System Company*, 409 F.2d 367 (5th Cir. 1968) (applying Alabama law); *Geohagan v. General Motors Corp.*, 291 Ala. 167, 279 So.2d 436 (1973).

Clause: "to encourage trade and credit by promoting confidence in the stability of contractual obligations." *United States Trust Co. of New York v. New Jersey,* 431 U.S. at 15. The decision below undercuts any expectation of stability in the insurance industry in Alabama.[11] It eliminates from the insurer's considerations the existing law of the state in which it contracts, and exposes the insurer to unforeseen and unpredictable creations of new obligations by state courts—not in small matters of detail, but, in this case, increasing liability more than 2,100 times.[12]

This Court's decision in *Tidal Oil Company v. Flanagan,* 263 U.S. 444 (1924), that the Contract Clause was directed only to impairments of contracts by legislation, and not by judgments of state courts, poses the only possible bar to concluding that the decision below violates the Contract Clause. *Tidal Oil,* however, runs counter to the central concern of the Contract Clause, and rests upon a formalistic and outmoded view of the law which holds that judges do not make new law, but simply declare what the law has always been.[13] Because this view is inconsistent with the Court's retroactivity decisions,

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[11] Moreover, the imposition of unpredictable and substantial punitive damages upon insurance companies hampers compliance with and enforcement of state insurance laws and regulations, particularly those requirements relating to the maintenance of adequate reserves and requirements designed to ensure the solvency of insurance companies.

[12] This Court recently recognized the unfairness of applying laws which were not within the parties' expectations at the time of contracting. In *Phillips Petroleum Co. v. Shutts,* No. 84-233 (June 26, 1985), the Court concluded that Kansas contract and equity law could not be applied to transactions of the parties in a manner consistent with due process, stating (at 25) (citations omitted):

> When considering fairness in this context, an important element is the expectation of the parties .... There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control.

[13] Moreover, the historical basis of *Tidal Oil* is suspect. As early as 1863, this Court in *Gelpcke v. City of Dubuque,* 1 Wall. 175, expressed an interpretation of the Clause which is more consonant with its purpose—namely, that if a contract, when made, is valid, it cannot be impaired by subsequent legislation or by judical decision altering the construction of the law.

this Court must reconcile *Tidal Oil* with the realities of modern-day jurisprudence.[14]

Only by protecting Aetna's valid contractual expectations from unpredictable legislation by the judiciary can this Court preserve the values embodied in the Contract Clause. To hold this Clause inapplicable in this case would be to permit Alabama to accomplish through its judiciary what it could not constitutionally do through its legislature.

II. THE DECISION OF THE SUPREME COURT OF ALABAMA UNPHOLDING MASSIVE PUNITIVE DAMAGES SHOULD NOT STAND UNDER DUE PROCESS OR THE EIGHTH AMENDMENT

A. The Assessment of Punitive Damages Against Appellant is Violative of Due Process

Punitive damages are not "a favorite of the law." *See Smith v. Wade,* 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). They are an historical anomaly, transplanted in neo-natal form to American soil from eighteenth century England and nurtured by early American courts which employed punitive damages to compensate victims in small amounts for intangible injuries which the law otherwise did not recognize.[15] Punitive damages were thus awarded in small sums to victims

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[14] *Tidal Oil* is also inconsistent with other decisions of this Court. This Court *has* interpreted "law" to mean common law in the context of the First Amendment, which provides that "Congress shall make no law . . . abridging the freedom of speech." Even though the First Amendment refers specifically to law made by Congress, this Court has given the Amendment a broader interpretation. *See, e.g., Bridges v. California,* 314 U.S. 252 (1941) (applied to judicial contempt citations); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) (applied to common law actions of libel against public officials). *Cf. The Sunday Times v. United Kingdom,* 2 E. H. R. R. 245, 270 (European Court of Human Rights 1979) (" 'law' . . . covers not only statute but also unwritten law").

[15] The doctrine of punitive damages was recognized in 1851 by this Court in a modest way in *Day v. Woodworth,* 13 Howard 363 (1851). In a passage considered to be the foundation of punitive damages in American law, Justice Grier, writing for the Court, stated (13 Howard at 371):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may

(footnote continues)

of tortious conduct, such as libel or slander, where actual damages for humiliation or affronts to dignity were largely unascertainable. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability,* 18 Forum 377, 380-81 (1983).

From this small beginning, punitive damages have recently branched far beyond their origins in insult torts and have been stretched beyond the limits of their validity.[16] The expansion of this doctrine beyond the traditional tort areas, without historical justification, has brought an explosive increase in the size and frequency of punitive damages awards[17]—a phenomenon strikingly evident in this case, where a $3.5 million punitive damages award was upheld against Aetna for failure to pay a portion of a $3,000 insurance claim. Moreover, staggering

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(footnote continued)

> inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. . . . In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

[16] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

[17] The seemingly uncontrolled growth in both the size and frequency of punitive damages awards is evident in product liability and mass tort cases. *See, e.g., O'Gilvie v. International Platex,* No. 83-1846-K (D. Kan. May 24, 1985) ($10 million jury award of punitive damages reduced to $1.35 million after defendant implemented remedial measures); *Grimshaw v. Ford Motor Co.,* 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) ($125 million punitive award remitted to $3.5 million); *Ford Motor Company v. Stubblefield,* 319 S.E.2d 460 (Ga. App. 1984) ($8 million); *Palmer v. A.H. Robins Co.,* 684 P.2d 187 (Colo. 1984) ($6.2 million); *Dorsey v. Honda Motor Co.,* 655 F.2d 650 (5th Cir. 1981) ($5 million), *modified on other grounds,* 670 F.2d 21 (5th Cir.), *cert. denied,* 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank,* 276 Ark. 486, 638 S.W.2d 660 (1982) ($3 million); *Hasson v. Ford Motor Company,* 32 Cal.3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982) ($4 million), *cert. dismissed,* 459 U.S. 1190 (1983). Many other comparable awards, and awards in smaller amounts, have proliferated.

sums have been awarded as punitive damages in other cases against insurance companies by juries, who, left unguided, have assessed damages "in a way that can only be called freakish." *Gregg v. Georgia*, 428 U.S. 153, 206, *reh'g denied*, 429 U.S. 875 (1976).[18] The lower courts have varied unpredictably in their willingness to face the implications of such awards for fairness and due process. Although some awards have not survived judicial scrutiny,[19] many have.[20]

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[18] While perhaps some of the more exorbitant punitive damages awards have been rendered by juries in California and Arizona, *see* notes 19 and 20, *infra*, similarly outrageous awards have been handed down by Alabama juries. Two recent cases, one affirming a jury award of $1,250,000 against an insurance company on a bad faith claim, *see Nationwide Mutual Insurance Co. v. Clay*, Nos. 82-536, 82-917 (Ala. Feb. 8, 1985), and another affirming an award of $3,000,000, *see American Pioneer Life Insurance Co. v. Sandlin*, No. 82-1063 (Ala. April 12, 1985), amply demonstrate the arbitrariness of punitive damages awards in insurance litigation.

[19] *See, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages); *Egan v. Mutual of Omaha*, 24 Cal. 3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed*, 445 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974).

[20] *See, e.g., T.D.S. Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520 (11th Cir. 1985) (jury award of $2.1 million in punitive damages against insurer held not to be excessive); *Tibbs v. Great American Insurance Co.*, 755 F.2d 1370 (9th Cir. 1985) (court upheld award of $600,000 in punitive damages); *Dempsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million); *Frazier v. Metropolitan Life Insurance Co.* No. B004240 (Cal. App. June 10, 1984) (jury award of $8 million in punitive damages, as remitted to $2 million, overturned upon finding that claim was time-barred); *Moore v. American United Life Insurance Co.*, 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984) (court held $2.5 million punitive damages award not to be excessive, even though award was 83 times the amount of compensatory damages); *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million award punitive damages for insurer's tortious termination of insurance benefits upheld); *Pistorius v. Prudential Insurance Co.*, 123 Cal. App. 3d 541, 176 Cal. Rptr. 660 (1981) (court upheld award of $1 million in

(footnote continues)

The conduct of the insurance business suffers in particular because insurance depends heavily on the ability to make careful and exact computations of risks. Contracts of insurance are premised upon these risk calculations, and the ability of insurers to predict with relative accuracy their liabilities over a period of time is crucial to the development and maintenance of adequate reserves in any sound system of insurance.

Because the purposes and impact of punitive damages awards are plainly penal, constitutional protections akin to those accorded to criminal defendants should be afforded to defendants in punitive damages actions. A civil label should not blind this Court to their penal nature and purposes. *See, e.g., United States v. Ward,* 448 U.S. 242, *reh'g denied,* 448 U.S. 916 (1980); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963). As this Court has stated:

> How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them! . . . Doubtless even a clear . . . classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute.

Trop v. Dulles, 356 U.S. 86, 94-95 (1958). Thus, although a penalty has been labeled civil, this Court has declined to view it as such where the penalty is "so punitive either in purpose or effect" as to negate such a labeling. *United States v. Ward,* 448 U.S. at 248-49.[21]

(footnote continued)

punitive damages); *Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978) (court upheld jury award of punitive damages, as reduced to $740,000).

[21] This Court, as well as the lower courts, have been guided by the list of considerations articulated in *Mendoza-Martinez,* 372 U.S. at 168-69, in determining whether a law is penal in nature. Assessed under these factors, which are "neither exhaustive nor dispositive," *United States v. Ward,* 448 U.S. at 249, punitive damages can only be deemed penal. While punitive damages impose no "affimative disability or restraint," *Mendoza-Martinez,* 372 U.S. at 168, they typically are imposed upon a showing of "willfulness"

(footnote continues)

Members of this Court have recognized that punitive damages are essentially penal. Indeed, this Court has stated:

> Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrence.'

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48 (1979) (emphasis added), *quoting Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974). *See also Smith v. Wade,* 461 U.S. 30, 58 (dissenting opinion of Justice Rehnquist). Punitive damages thus further no goals of the civil law. They serve only to promote the traditional goals of punishment, namely, retribution and deterrence—goals which this Court has stated "are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish,* 441 U.S. 520, 539 n. 20 (1979).

This Court in *Mendoza-Martinez* recognized that constitutional safeguards must be accorded to defendants in proceedings in which the sanction to be imposed is punishment. In striking down a statute which provided for the automatic forfeiture of citizenship as a penalty for draft evasion, the Court concluded that the statute was essentially penal, and that its application deprived the appellees of their citizenship without due process of law and without according them the rights guaranteed by the Fifth and Sixth Amendments. In so holding, the Court stated:

> What we hold is only that, in keeping with . . . cherished tradition, punishment cannot be imposed 'without due process of law.' Any lesser

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(footnote continued)

or "maliciousness", they are often assessed in amounts greater than criminal actions involving similar conduct, and no alternative purposes—other than punishment and deterrence—can rationally be assigned to them. *See* Grass, *The Penal Dimensions of Punitive Damages,* 12 Hastings Const. L. Q. 241 (1985), and Wheeler, *The Constitutional Case for Reforming Punitive Damages,* 69 Va. L. Rev. 269 (1983), for exhaustive analyses of the penal nature of punitive damages.

> holding would ignore the constitutional mandate upon which our essential liberties depend.

Mendoza-Martinez, 372 U.S. at 186.

That punitive damages actions, as they now exist, fail to comport with even the simplest notion of due process is evident from the complete lack of standards for assessing punitive damages, coupled with the unbridled discretion of judges and juries in awarding such damages. Punitive damages, in undefined and accelerating amounts, have been awarded to punish and deter conduct which ranges from "malice" to some degree of "negligence." A multitude of necessarily overlapping and somewhat redundant terms have been employed to support awards of punitive damages against a defendant whose conduct lies somewhere in between.[22] And, application of these "standards" continues to be imprecise, given the uncertainty surrounding the definitions of such terms as "malice," *see Smith v. Wade,* 461 U.S. 30, 38-41 and n.6, and given the blurred distinctions between terms like "willful," "wanton," "reckless

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[22] While awards of punitive damages have traditionally been premised upon conduct which is found to be "malicious," "willful" or "wanton", these standards, though never carefully defined, have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence. *See, e.g., Dempsey v. Auto Owners Insurance,* 717 F.2d 556, 561 (11th Cir. 1983) (applying Alabama's standard requiring "maliciousness, willfulness, or wanton and reckless disregard for the rights of others," court upheld punitive award as remitted to $1.5 million); *Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506, 526 (5th Cir. 1984) (applying Mississippi's requirement of a showing of "wanton, gross, or intentionally wrongful conduct," court disallowed punitive damages award); *Airco Inc. v. Simmons First National Bank,* 276 Ark. 486, 638 S.W.2d 660, 663 (1982) (defendant's reckless disregard of the consequences held to warrant $3 million punitive award); *Maxey v. Freightliner Corporation,* 450 F.Supp. 955, 963 (N.D. Tex. 1978) (punitive damages may be awarded if defendant acts "intentionally or willfully, or with a degree of 'gross negligence' which approximates a fixed purpose to bring about the injury"), *aff'd,* 623 F.2d 395 (5th Cir. 1980), *vacated and remanded upon rehearing,* 665 F.2d 1367 (5th Cir. 1982), *vacated in part and aff'd in part,* 722 F.2d 1238 (5th Cir. 1984); *Sturm, Ruger & Co. v. Day,* 594 P.2d 38, 46 (Alaska 1979), *cert. denied,* 454 U.S. 894 (1981) (even though punitive damages were warranted on the basis of

(footnote continues)

disregard" and "conscious indifference." *See* Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982).[23] Consequently, these vague and varying standards provide no real guidance to courts and juries. *Id.*[24] Moreover, the standards upon which courts rely in reviewing

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(footnote continued)

defendant's "reckless indifference to rights of others, and conscious action in deliberate disregard of them," jury award was held to be excessive); *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036, 1043 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1749 (1985) (punitive damages awarded on the basis of Texas' "gross negligence" standard); *Campus Sweater & Sports Wear Co. v. M.B. Kahn Construction Co.*, 515 F.Supp. 64, 104 (D.S.C. 1979) (punitive damages upheld on basis of South Carolina's standard of negligence which is "so gross or reckless of consequences as to imply or assume the nature of a wantonness, willfulness or recklessness"), *aff'd without opinion*, 644 F.2d 877 (4th Cir. 1981). *See also* Meyers and Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 51 Ins. Counsel J. 212 (April 1984). The Court below, in upholding the $3.5 million punitive award against Aetna, apparently deemed Aetna's conduct to be "oppressive, malicious, willful [and] fraudulent." Jurisdictional Statement, App. A at 35a.

[23] The difficulty of distinguishing between conduct which is "reckless" as opposed to merely "negligent" leads inevitably to inconsistent applications of these standards. As stated by one author:

> Unfortunately, the distinction between recklessness and negligence relates to no clear behavioral standards in the real world .... It is truly striking how we have devised a system that is not far removed from a lottery for deciding such grave matters—with the draw determined by not only the predilections of the presiding judge, but the emotions of the jury sitting in the case.

Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978).

[24] In an opinion certifying Montana law to a Federal district court, the Supreme Court of Montana recognized this uncertainty in the area of punitive damages. *See First Bank (N.A.)—Billings. v. Transamerica Insurance Co.*, 679 P.2d. 1217 (Mont. 1984). In concluding that insurance coverage of punitive damages does not violate Montana's public policy, the court noted that "juries and judges typically award punitives for a broad range of conduct not often described as willful or wanton, but as merely reckless or unjustifiable." *Id.* at 1222. Refusing to preclude such insurance coverage in light of the uncertainty in the area of punitive damages, the court further stated that "fact-finders ... wrestle with concepts like recklessness and reasonableness,

(footnote continues)

jury awards of punitive damages are equally imprecise, requiring judges to inquire generally whether an award reflects the passions or prejudices of the jury.[25]

Similarly vague are the standards used for determining the amount of punitive damages to be assessed against a defendant. This amount is generally left to the sole discretion of the jury, guided only by certain ill-defined factors relating to the nature of the defendant's misdeed and including the wealth of the defendant, thus emphasizing the punitive nature of the award. The lack of standards, and, indeed, of rationality, for assessing punitive damages has prompted members of this Court to comment on the arbitrary and prejudicial nature of punitive damages awards. As Justice Powell stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1973):

> In most jurisdictions jury discretion over the amounts [of punitive damages] awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

See also International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 50-51 (1979); *Smith v. Wade*, 461 U.S. 30,

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(footnote continued)

such that defendants may not know that their conduct constituted presumed malice until after trial, and that a defendant in one case may never know the sting of punitive damages while another defendant in a similar case may be faced with financing a sizeable award." *Id.* Recognizing, as the Montana Supreme Court did, the randomness of punitive damages awards, the Montana legislature passed legislation, effective April 16, 1985, limiting the applicability of punitive damages. The statute requires, *inter alia*, that the elements of a claim for punitive damages be proven by clear and convincing evidence, and places limits on the amounts in which punitive damages can be awarded. *See* Mont. Code Ann. § 27-1-221 (1983), as amended by House Bill 363.

[25] The potential for arbitrariness is inevitably increased when articulable standards are not applied to judicial action. *See* pp. 3-5, *supra*. Resort to *ad hoc* decisions regarding judicial ethics is an inappropriate, and ineffective, method of protecting constitutional rights. Only the application and enforcement by judicial tribunals of sound constitutional standards, establishing predicate conduct and adequate procedures and governing the proportionality of awards, can adequately ensure that these rights are not abrogated.

56-65, 92-94 (dissenting opinions of Justices Rehnquist and O'Connor).[26]

Despite the complete lack of standards for assessing punitive damages, no unique procedures have been developed to protect a defendant in a punitive damages action from the risk that such damages will be improperly awarded, based upon the whim or caprice of a judge or jury. Further, the absence of procedures satisfying even the most fundamental concepts of due process results in arbitrary and erroneous deprivations of property, and in the stigma which necessarily attaches to a defendant whose conduct is characterized as "fraudulent," "malicious" or "wanton". Due process cannot be satisfied in a punitive damages action without detailed and carefully tailored procedural safeguards, such as an elevated standard of proof, limitations on the amounts of punitive damages, and bifurcation of punitive damages trials.

The constitutional infirmities which inhere in punitive damages actions should no longer be ignored. If not eliminated entirely from the field of insurance—an area where they do not belong—punitive damages should be limited, and defendants should, at a minimum, be accorded the constitutional protections guaranteed to other defendants who are subject to punishment by juries and courts. The ultimate responsibility rests with this Court to guard against stealthy encroachments upon constitutional rights by practices which spring from unjustified deviations in the law. No better example of a stealthy encroachment—and one which should be halted by this Court—exists than punitive damages.

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[26] As Justice Rehnquist stated in *Smith v. Wade* (461 U.S. at 87-88):

> It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm, and to award a windfall, in the form of punitive damages to someone who already has been fully compensated. These peculiarities ought to be carefully limited—not expanded to every case where a jury may think a defendant was too careless, particularly where a vaguely defined, elastic standard like "reckless indifference" gives free reign to the biases and prejudices of juries. In short, there are persuasive reasons not to create a new punitive damages remedy unless it is clear that Congress so intended.

B. The Decision Below Imposes an Excessive Fine in Violation of the Eighth Amendment

Whereas due process provides safeguards against procedures which result in arbitrary awards and standardless verdicts, the Eighth Amendment provides an added protection against arbitrariness and excessiveness in punishment. Focusing upon the result itself, the Eighth Amendment ensures that punishment will not be meted out arbitrarily, or in excessive amounts wholly disproportionate to the offense. Even assuming that the procedures employed in assessing and upholding punitive damages awards comport with due process—which they do not—the decision below cannot survive scrutiny under the Eighth Amendment.

The Eighth Amendment's ban against excessive punishments and requirement of proportionality derive from English law. By the thirteenth century, discretionary amercements, often excessive and oppressive, had become prevalent in England—so prevalent that three chapters of the Magna Carta were devoted to their control.[27] Indeed, Chapter 20 of the Magna Carta, setting forth the rule against excessiveness in punishment, provided:

> A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence, and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid

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[27] *See* Granucci, "*Nor Cruel and Unusual Punishment Inflicted*": *The Original Meaning*, 57 Cal. L.R. 839, 845 (1969). The amercement was the equivalent of the modern fine. Amercements, given their discretionary character, permitted the circumstances of each case to be considered, and the fine fixed accordingly, but invited the opportunity for arbitrariness and excessiveness. *Id.*

> amercements shall be imposed except by the testimony of reputable men of the neighborhood.

J. Holt, *Magna Carta* 323 (1965).[28]

The principle that amercements could not be excessive was reiterated in the English Bill of Rights of 1689, which, in language borrowed by the framers, strove to curb selective and arbitrary application of harsh penalties by incorporating "the longstanding principle of English law that the punishment . . . should not be . . . greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959). Evidencing the intent of the English Bill of Rights to preclude disproportionate and excessive fines, the House of Lords, "barely three months after the Bill of Rights was adopted . . . declared that a 'fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land." *Solem v. Helm,* 463 U.S. 277, 285 (1983), *quoting Earl of Devon's Case,* 11 State Tr. 133, 136 (1689).

The concept of proportionality which was firmly embedded in English law by 1689 was transplanted to American soil, and ultimately incorporated into the Bill of Rights as the Eighth Amendment. *See Solem v. Helm,* 463 U.S. at 285-86. This "constitutional principle of proportionality," *id.* at 286, was recognized by this Court as early as 1910. In *Weems v. United States,* 217 U.S. 349, 367 (1910), the Court held that the Eighth Amendment precluded the punishment of 15 years of imprisonment plus hard labor in chains for the crime of falsifying a public document, noting "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." On repeated occasions since *Weems,* the Court has resorted to the constitutional principle of

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[28] Maitland said of this chapter that "very likely there was no clause in the Magna Carta more grateful to the mass of the people." F. Maitland, Pleas of the Crown for the County of Gloucester xxxiv (1884), *cited in* Granucci, *supra,* at 845.

proportionality to conclude that certain punishments are, or are not, excessive.[29] Most recently, this Court in *Solem* revisited the concept of proportionality in punishments, holding that the Eighth Amendment prohibits a life sentence, without possibility of parole, for the commission of a seventh nonviolent felony.[30]

Although this Court has had little occasion to address the Excessive Fines Clause of the Eighth Amendment, the cases decided under the Cruel and Unusual Punishments Clause provide a useful framework for assessing the validity of punitive damages under the Eighth Amendment—an issue of first impression in this Court. In light of the common origin of the clauses of the Eighth Amendment, the concept of proportionality should be equally applicable to all of the clauses of the Amendment. Indeed, as this Court has stated:

> We have recognized that the Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments, *Ingraham v. Wright, supra,* at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment

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[29] *See Coker v. Georgia,* 433 U.S. 584 (1977) (death sentence held to be grossly disproportionate and excessive for the crime of rape); *Trop v. Dulles,* 356 U.S. 92 (1958) (expatriation for wartime desertion violated the Eighth Amendment); *Enmund v. Florida,* 458 U.S. 782 (1982) (death penalty for felony murder held to be excessive under the circumstances); *Gregg v. Georgia,* 428 U.S. 153 (1976) (death penalty for murder upheld).

[30] In so holding, the Court weighed the gravity of the offense and the harshness of the penalty, and looked to the sentences imposed for similar conduct in the same and other jurisdictions, stating that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* at 291. Applying the considerations enunciated in *Solem,* a punitive award, 2,100 times the amount of actual damages, is obviously excessive and grossly disproportionate to the offense of bad faith failure to pay an insurance claim. Moreover, consideration of the fines allowed for violation of the Alabama Insurance Code, which proscribes a general practice of refusing to pay or settle claims, removes all doubt that the award here was excessive. Section 27-1-12 of the Alabama Code provides that a *willful* violation of the statute is punishable, at most, by a $1,000 fine. *See* Ala. Code § 27-1-12 (1975).

> were not. There is also no historical support for such an exception.

Solem v. Helm, 463 U.S. at 289.

The governing principle of proportionality as a protection against arbitrariness and excessiveness in punishment compels reversal of the award of $3.5 million against Aetna for the "offense" of paying only a portion, rather than the whole, of a $3,000 insurance claim. The award of $3.5 million in punitive damages against Aetna was rendered in a proceeding which failed to comport with due process, and which permitted the jury to award punitive damages in an amount which was arbitrary and wholly disproportionate to the offense charged.[31] The complete absence of standards for assessing punitive damages (an infirmity which would not survive in other criminal contexts) has led inevitably to a proliferation of similar punitive awards—a result which the Eighth Amendment proscribes.

Despite the magnitude of the punitive damages award assessed against Aetna, the court below concluded that "the verdict is [not] so excessive as to warrant a finding that it was based upon bias, passion, prejudice or some other improper motive." Jurisdictional Statement, App. A at 35a. To call the verdict below anything but excessive, however, rejects the concept of proportionality, and gives open-ended indulgence to the sort of judge or jury passion that inflates such awards. By upholding an award of $3.5 million in punitive damages—a punishment that is over 2,100 times the amount of actual

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[31] Significantly, this Court, reviewing the role of the jury in meting out criminal sentences, has emphasized the importance of providing proper guidance to juries to protect against arbitrary and discriminatory sentences. *See Gregg v. Georgia*, 428 U.S. at 189 ("discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). Although guidance has traditionally been provided to juries assessing punishment in criminal contexts, no similar guidance—or, at least, no useful guidance—has been rendered by courts to juries vested with the power to assess punitive damages.

damages allegedly suffered—the court below has sanctioned a scheme of punishment which bears no rational relation to the offense charged.[32] Such punishment should not be upheld under the plain words and purposes of the Eighth Amendment.

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[32] This Court has held a fine of $3.5 million to be excessive. In *United States v. United Mine Workers*, 330 U.S. 258, 304-05 (1947), this Court concluded that an unconditional fine of $3.5 million against a union for criminal contempt was excessive, in light of the character of the defendant's conduct, the effectiveness of the sanction, the financial resources of the defendant and the burden imposed upon the defendant. The Court reduced the fine to $700,000, with an additional fine of $2,800,000 payable if the defendant persisted with its noncompliance with a restraining order.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Appellant, the decision below should be reversed.

Respectfully submitted,

Of Counsel:
JACK H. BLAINE
Vice President, State Relations, and General Counsel
EDWARD J. ZIMMERMAN
Senior Associate General Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1850 K Street, N.W.
Washington, D.C. 20006-2284
(202) 862-4000

JOE W. PEEL
Vice President and General Counsel
JOHN P. DINEEN
Assistant General Counsel
HEALTH INSURANCE ASSOCIATION OF AMERICA
919 Third Avenue
28th Floor
New York, New York 10022
(212) 486-5578

ERWIN N. GRISWOLD
(Counsel of Record)
THOMAS F. CULLEN, JR.
PATRICIA A. DUNN
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939

Counsel for Amici

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellants,

versus

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

Amicus Brief of Alabama Defense Lawyers Association in Support of Petitioner Aetna Life Insurance Co.

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*Davis Carr
Alabama Defense Lawyers Association
c/o Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

*Counsel of Record

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I

STATEMENT OF INTEREST

This association has an interest in the administration of justice for the citizens and businesses in the State of Alabama. Counsel represents that, given the page limitations, appellant will not be adequately able to fully address all legal issues concerning whether Alabama Supreme Court Justice T. Eric Embry should have recused himself, and further, how that action impacted the entire court. More importantly, this association's participation in the briefing process will underscore that the issues presented for this Court go beyond a resolution in the case at bar, to address the due process of all litigants before the Alabama Supreme Court. That is, this association's participation is intended to demonstrate that the concern for fairness goes beyond the insurance company involved in this litigation, and the proceedings below need to be examined in light of these due process and fairness issues as they concern the administration of justice in the State of Alabama.

STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The statement of issues and statement of the case presented by Aetna in brief are adopted. This brief addresses only the disqualification issue. In that regard, the issue presented is not narrowly whether Justice Embry had a "pecuniary interest" in the outcome of the litigation, but more basically, whether due process concerns for the appearance of a fair trial mandated his recusal, and the Court's recusal.

ARGUMENT

A. THE HISTORICAL BASIS FOR CONCERNS WITH FAIRNESS AND THE APPEARANCE OF FAIRNESS IN OUR JUDICIAL SYSTEM: DUE PROCESS

> [A]n appearance of evil is often worse than the evil itself, and others get the notion that we do not administer justice in our court system.[1]

The judiciary's concern for moral rectitude is not unique. Society has long been concerned with the issue of integrity. *Proverbs* 20:7. Indeed, Aristotle viewed law itself as an outgrowth of a moral ideal. H. Cairnes, *Legal Philosophy from Plato to Hegel* 107 (1949). Other students of jurisprudence such as St. Thomas Aquinas attributed a theological foundation to law, *Id.* at 167; hence our preoccupation with cardinal virtues in judicial ethics.

In fact, one of the earliest and most significant opinions issued by this Court, *Marbury vs. Madison*, 1 Cranch 137 (1803), illustrated why respect for the judiciary is so crucial. As noted by Hamilton in *The Federalist* No. 78:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of

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1 *Potashnick vs. Port City Const. Co.*, 609 F.2d 1101, n. 8 (5th Cir.), *cert. denied* 449 U.S. 820 (1980). [Hereinafter *Potashnick*].

> the strength or of the wealth of the society: and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgments: and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power...

Justice Frankfurter, dissenting in *Baker vs. Carr*, 369 U.S. 186, 267 (1962) agreed, noting that the court possesses "neither the purse nor the sword".

Early English common law practice required disqualification solely for financial interest. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 611-12 (1947). American courts, however, expanded this narrow view. *Id.* at 612. Consequently, today disqualification may be necessary even though there is no bias in fact. *Hall vs. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983); *Limeco, Inc. vs. Division of Lime*, 571 F.Supp 710, 711 (N.D. Miss. 1983); *Bolden vs. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), *rev'd on other grounds*, 267 Ark. 504, 593 S.W.2d 156 (1980) (commending judge for voluntary recusal, whether he actually sheltered any bias or not, to dispell any suspicion that litigants might not be receiving an impartial trial); and *State vs. Deutsch*, 34 N.J. 190, 168 A.2d 12 (1961).

The so-called "duty to sit" rule has been replaced with, in the federal system, codified rules preferring error on the

side of caution and disqualification. *Potashnick*, *supra*, at 1112.

In short, public confidence in the impartiality and reasoned foundation of judicial decisions is the basis of the authority of the judiciary. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 764 (1973). Public trust in our court system is doubtless or should be of preeminent concern. *See*, *e.g.*, H. James, *Crisis in the Courts* (1967) and H. Jacob, *Justice in America* (1972).

Based on the foregoing, it is no surprise that the Court has "always endeavoured to prevent even the probability of unfairness," *Withrow vs. Larkin*, 421 U.S. 35, 47 (1975) (*quoting In re Murchison*, 349 U.S. 133, 136 (1955), and the Court has further made "a fair trial and a fair tribunal" a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). *See also*, *Ward vs. Monroeville*, 409 U.S. 57 (1972), *Tumey vs Ohio*, 273 U.S. 510 (1927). Alabama follows, which will be discussed more thoroughly. *Ex parte White*, 53 Ala. App. 377, 300 So.2d 420, *cert. denied* 293 Ala. 778, 300 So.2d 439 (1974) (quoting Sir Thomas Moore: "If the parties will at my hand call for justice, then were it my father on one side, and the devil on the other, his cause being good, the devil should have right").

A litigant, consequently, is entitled to be heard by a judge who is "wholly disinterested" in the matter before him. *Withrow vs. Larkin*, 421 U.S. 35, 46-47 (1975). This entitlement, founded in due process, is the foundation upon which our judicial system rests. *See*, *In re Murchison*, 349 U.S. 133, 136 (1955).

B. THE EXPERIENCE OF FEDERAL AND STATE COURTS ON THE ISSUE OF INSURING THE APPEARANCE OF EXEMPLARY JUDICIAL ACTIVITY

> Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct.[2]

The Canons of Judicial Ethics implore judges to avoid the appearance of impropriety as well as impropriety itself. The appearance of fairness has long been a concern of this Court. *See, e.g., Berger vs. United States*, 255 U.S. 22 (1921). By legislation for federal courts, Canon 3C of the Code of Judicial Conduct, *reprinted in* 69 F.R.D. 273 (1975) has been converted into law, 28 U.S.C. §455. *Hall, supra*, at 178. *See*, H. R. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974). Alabama, likewise, adopted the Canons of Judicial Ethics as having the force of law. *Matter of Sheffield*, 465 So.2d 350, 355 (Ala. 1984) ("The canons are not merely guidelines for proper judicial conduct."); *Wallace vs. Wallace*, 352 So.2d. 1376, 1378n. 1 (Ala.Civ.App. 1977). The Canons, as interpreted by courts in the federal system, require recusal if impartiality "might reasonably be questioned." *Hall, supra*, at 178; *Potashnick, supra*, at 1111. The state courts, have, similarly, overwhelmingly required recusal where impartiality "might" be questioned. *See, e.g., Bolden vs. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), *rev'd on other grounds*, 267 Ark. 504, 593 S.W.2d 156 (1980); *Rudolph vs. Gorman*, 169 Cal. App.2d 66, 338 P.2d 218 (1959); *People vs. District Court in and for Third Jud. Dist.*, 192 Colo. 503, 560 P.2d 828 (1977) ("Caesar demanded that

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2 *Hall vs Small Business Admin.*, 695 F.2d 175, 176, (5th Cir. 1983) [Hereinafter *Hall*].

his wife shall not only be virtuous, but beyond suspicion; and the tate should not be any less exacting with its judicial officers...") (560 P.2d at 832 n. 1, *quoting State ex rel. Barnard vs. Board of Education*, 19 Wash. 8, 52 P. 317, 321 (1898)); *In re Hupp's Estate*, 178 Kan. 672, 291 P.2d 428 (1955); *Sadberry vs. Wilson*, 441 P.2d 381 (Okla. 1968); *Municipal Publications, Inc. vs. Court of Common Pleas of Philadelphia County*, ___ Pa. ___, 489 A.2d 1286 (1985); *People vs. Esposito*, 199 N.Y.S.2d 368 (1960); *Chicago, Milwaukee, St. Paul and Pacific R.R. Co. vs. Washington State Human Rights Com'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976).

As noted in virtually all cases just cited, the *appearance* of impartiality is the goal of Canon 3C. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 745 n. 33 (1973). Justice Frankfurter, in a rare expression by a sitting Justice recognizing his own bias, and explaining his recusal in the Washington bus loudspeaker case, noted:

> The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact... . My feelings are so strongly engaged... that I had better not participate in judicial judgment upon it.

Public Utilities Com'n vs. Pollak, 343 U.S. 451, 467 (1952) (Frankfurter, J.). Actual virtue, therefore, is not the determining factor. *Hall, supra*, at 179. *See also, Sadberry vs. Wilson*, 441 P.2d 381, 384 (Okla. 1968) (notwithstanding that the judge "may sincerely feel that he can act impartially".); *Chicago, Milwaukee, St. Paul and Pacific R.R. Co. vs. Washington State Human Rights Com'n*, 87 Wash.2d 802, 557 P.2d 307, 312 (1976) (The appearance of fairness

requires recusal "even if that interest [accused] did not actually affect him"). Recusal also may be required even though the alleged basis for an impermissible interest "may be known to the judge and all mankind to be false." *People vs. District Court in and for Third Jud. Dist.*, 192 Colo. 503, 560 P.2d 828, 832 (1977) *quoting People ex rel. Burke vs. District Court*, 60 Colo. 1, 8-9, 152 P. 149, 152 (1915).

The importance of the foregoing authorities is that, if it reasonably appears to the public that a judge should not sit in judgment over principles which would apply to his own case, then recusal is mandated, It is important to recognize that this is not a personal attack upon the judge, or the court, but rather the judiciary's concern that the appearance of impartiality be preserved to maintain public confidence.

C. THE ALABAMA EXPERIENCE

> We do not take this subject of disqualification lightly. It is a matter of great importance affecting the orderly processes of our judiciary. A grave responsibility has been handed to us, and we are mindful of its implications. At the same time, we are aware of our obligation in preserving judicial impartiality. Every principle of law and canon of judicial conduct in our system of jurisprudence mandates the cold and stern neutrality of an impartial judge. Anything less is a travesty.[3]

As early as 1878, in *Gill vs. State*, 61 Ala. 169 (1878) the Alabama Supreme Court recognized the significance of

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3 *Ex parte White*, 53 Ala. App. 377, 300 So.2d 420, 434, *cert, denied*, 293 Ala. 778, 300 So.2d 439 (1974).

disinterested judicial officers:

> According to the stern morality of the common law, a judge is required to be legally indifferent between the parties. Any, the sightest pecuniary interest in the result, disqualifies.

Id. at 172. In another early opinion, the Court recognized:

> Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify.

Ex parte Cornwell, 144 Ala. 497, 39 So. 354, 354 (1905).

In 1967, when a fellow justice was a plaintiff in his own personal injury suit arising out of the justice's untimely collision with a utility pole, and when the litigation ended up in Montgomery, the entire Court recused itself. *Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967). Current Alabama Supreme Court Justice Maddox, concurring specially as to the ruling on Aetna's Motion for Disqualification in this case, also explained that in *Duncan vs. Johnson*, 338 So.2d 1243 (Ala. 1976), "I recused myself because a justice had represented one of the parties to the litigation." *Aetna Life & Casualty vs. Lavoie*, ___ So.2d ___, 19 Ala. Bar Rptr. 1147, 1153 n. 1 (March 8, 1985). A footnote to the *Duncan vs. Johnson* opinion reveals that the entire panel of Alabama Supreme Court Justices recused themselves. Alabama, also, has been concerned with the appearance of impropriety. *Matter of Sheffield*, 465 So.2d 350, 356-357 (Ala. 1984); *Acromag-Viking vs. Blalock*, 420 So.2d 60, 61-62 (Ala. 1982); *Wallace vs. Wallace*, 352 So.2d 1376, 1379-1380 (Ala. Civ. App. 1977); and *Ex parte White*,

53 Ala. App. 377, 300 So.2d 420, 428-434, *cert. denied*, 293 Ala. 778, 300 So.2d 439 (1974).

Consequently, members of the current Alabama Supreme Court have addressed circumstances when the "totality of facts" create a "reasonable question of impartiality", and the corresponding duty to avoid the appearance of impropriety by resolving all doubts in favor of recusal. *Matter of Sheffield*, *supra* (opinion authored by Justice Jones, with Justices Maddox, Faulkner, Almon, Shores and Adams concurring. Justice Beatty and Chief Justice Tobert concurred in the result, and Justice Embry was "not sitting."); *Acromag-Viking vs. Blalock*, *supra*, (opinion by Justice Maddox with Justices Faulkner, Jones, Almon, Shores, Embry, Beatty and Adams concurring, as well as Chief Justice Torbert). The Alabama Court of Civil Appeals, addressing a case involving whether the trial judge presiding over our Governor's divorce proceedings was a little too close to the governor, observed:

> The reasonable question is raised in the mind of the public who must believe in the total integrity and impartiality of their judges. We believe the purpose and function of the Canons of Judicial Ethics is to support the belief and confidence of the people in their courts.

Wallace vs. Wallace, 352 So.2d 1376, 1379 (Ala. Civ. App. 1977).

D. THE CHALLENGED JUDGE SHOULD NOT JUDGE HIMSELF

> To perform its high function in the best way "justice" must satisfy the appearance of justice.[4]

The challeged judge should not judge himself. Recall Justice Frankfurter's comment in the loudspeaker case, quoted herein, as well as *State vs. George*, 250 Ark. 968, 470 S.W.2d 593, 596 (1971); and *Municipal Publications, Inc. vs. Court of Common Pleas of Philadelphia County*, ____ Pa. ____, 489 A.2d 1286, 1289 (1985) ("Where the disqualification hearing brings in question the credibility of the judge, it is obvious that the judge is not in the position to maintain the objective posture required to preside over the preceding and to assume the role of the trier of fact in that proceeding"). *See generally*, *Berger vs. United States*, 225 U.S. 22 (1921) and Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1437 n. 22 (1966). The foregoing authorities represent merely an extension of the time-honored saying about a lawyer who represents himself.

It is important to reiterate that personal umbrage need not be taken by the actions asserted by Aetna. Indeed, such umbrage would illustrate the problems of sitting in judgment over one's self, and totally misses the point of avoiding the appearance of impropriety. As noted in the cases cited, it is not the truth *vel non* of the charges that is important. It is the perception of the public and the overriding importance of confidence in the integrity of the judicial system which due process mandates.

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4 *Offutt vs. United States*, 348 U.S. 11, 14 (1954).

Ignoring any question of impermissible interest of Justice Embry, the simpler question is whether in the minds of the public the Justice's impartiality might reasonably be questioned. It is submitted that it would be impossible to conclude such an appearance could not exist. Suppose Justice X of the State Supreme Court was arrested, and a warrantless search of his locked briefcase revealed damaging evidence. Should that Justice be allowed to decide an unrelated case setting forth the standards for warrantless searches of locked briefcases? In response to the anticipated argument that no law is being molded here, one need only consider the checkered and evolving nature of Alabama's history concerning the development of the relatively new tort of bad faith, as set forth in Exhibit C on pages 59A-61A in the Petition of Writ of Certiorari, filed in a case substantially related to the one at bar, *Nationwide Mutual Insurance Co. vs. Clay*, S.Ct. No. 84-1942.

Moreover, a reading of the deposition of Justice Embry, set forth in its entirety in Exhibit 4 in the Appendix for Appellant in this case clearly reveals his predilections, not only in his bad faith suit (Appendix for Appellant, *Aetna vs. Lavoie*, 161a, 164a-170a, 173a-174a, 176a, 184a, 246a-247a) but also his feeling toward casualty companies in general. *Id.* at 166a ("They just goofed up like the casualty companies do, and other companies").

Suppose Judge Y's wife died in a car crash, resulting in the Judge's filing of a death suit against General Motors for faulty steering on a 1984 Riviera. Judge Y is subsequently assigned a suit by a plaintiff against General Motors, alleging the same or a similar defect on a 1984 Riviera. The uneasy feeling in the lower intestine of counsel for General Motors arises out of concern for impartiality, and this principle cuts both ways. There are doubtless numerous other examples which would create reasonable suspicion in the

minds of a public already highly distrustful of our legal system. This mandates avoiding the appearance of impropriety.

E. THE APPEARANCE OF IMPARTIALITY REQUIRES THE RECUSAL OF THE COURT

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.[5]

As noted in the preceding section, on two occasions since 1967, all members of the Alabama Supreme Court recused themselves because of the apparent involvement of one of their members in the questioned controversy. Counsel and those who have not presided with other judges do not know what influence chamber proceedings may have. There is no way to gauge the accuracy of accounts concerning chamber procedures, such as the controversial book by Bob Woodward on the Supreme Court proceedings. B. Woodward, *The Brethren* (1979). One would easily imagine, nonetheless, an exchange of ideas among the justices. At least, one would hope for such, even though the exchange may occasionally produce strongly differing viewpoints. One could also foresee respect for certain members, and a healthy critical view of others. It is not often there will be a record of the comments or ideas of the judge or justice sought to be disqualified such as there apparently was of Judge Landis in *Berger vs. United*

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5 Canon One - Code of Judicial Conduct, *reprinted* in 69 F.R.D. 274 (1975).

States, 255 U.S. 22 (1921).[6]

Notwithstanding this paucity of opinions, there is a line of cases in a sufficiently analogous field. Several cases have held that the relationship of a law clerk to a judge mandates recusal in instances where the clerk bears some relationship to the litigation before the judge. *Hall*, *supra*; *Fredonia Broadcasting Corp vs. RCA Corp.*, 569 F.2d 251 (5th Cir.), *cert. denied* 439 U.S. 859 (1978); *Miller Industries, Inc. vs. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala. 1980); *Simonson vs. General Motors Corp.*, 425 F. Supp. 574 (E.D. Pa. 1976); and *Reddy vs. Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976), *cert. denied* 439 U.S. 839 (1978).

Ostensibly, Brethren of a court would value the input of a fellow Justice no less than that of a law clerk. Implicit in the decisions requiring disqualification where a law clerk is associated is the concept that some subtle factor could sway the determination rendered by the judge. More importantly, and explicit in the decisions, is the concern for perceived fairness in the eyes of the public. Even though a law clerk might violently disagree with the decision reached by the judge, because of the perceived problem that the outcome "might be tainted," recusal has been mandated.

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6 Although note that the dissent of Justice Day, *id.* at 37, points out there was a substantial discrepancy between the alleged offending remarks submitted by affidavit, and the official transcript. Once again, this highlights that the important point is not whether the charges were true, but that unfairness was perceived.

In response to an anticipated argument that clerks are more clearly aligned with "their" judges, one would hope that such assistants to judges and justices serve as more than a mirror image, and that a free and fair difference of opinion occurs as often between a clerk and his judge as among judges.

All of this is admittedly in the realm of reasoned speculation, and again it is the concern for the appearance of fairness which should guide the Court to its conclusion. It would indeed be strange to expect a reasonable public to imagine that the involvement of a fellow justice would not rise to the same magnitude of a law clerk of the same justice.

As an example, there are unquestionably partners in law firms with personality conflicts. Regardless of the eagerness of partner A to encounter partner Z on the field of battle and claim victory, the public would perceive all partners to the firm as having loyaty to one another, and hence the prohibition against representing adversaries in one firm. In any event it would not be for partner A nor partner Z to determine whether to take the case, that decision would lie with the clients, assuming they would agree to such a conflict and assuming that the firm would place itself in such a precarious position. Are we to require less of our judiciary than we require of lawyers and clerks?

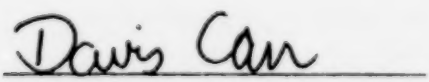
Only the members of the tribunal in question could testify whether the involvement of their fellow jurists had any impact on their respective decisions. Our system should not adopt a rule, however, which would suggest or require investigation into the decision-making process of an appellate tribunal. That is the reason the cases emphasize that the appearance of impartiality must be preserved, and there is a policy in favor of recusal, in such circumstances. The lofty and high-sounding comments quoted at the beginning

of each heading to this brief, and noted throughout the authorites cited in this brief, are either binding, or they are nothing. All of these forums have fully recognized the absolute requirement of unquestioned integrity in our judicial system. The point is not whether there is "guilt" or innocence. The point is avoiding even the hint that there may be guilt. These questions are faced in the age of a highly skeptical public, who are mindful of the old adage that the Devil looks after his own. This court is presented with the opportunity to adhere to the virtuous ideals uniformly mandated by all authorities on this topic, and by virtue of the historical precedent, or on the other hand distinguishing relevant case law to approve the proceedings below. The problem with the latter approach is that no matter how unintended, and no matter how pure the hearts of those involved, a feeling of suspicion for our system is one reason for the general lack of esteem of our courts, and its officers, the lawyers. This is why the case at bar affects more than the interests of the parties hereto, and why this Court should seize the opportunity to underscore the due process requirements of apparent fairness to litigants.

CONCLUSION

For the reasons advanced above, the judgement of the Alabama Supreme Court is due to be reversed and rendered.

Respectfully submitted,



Davis Carr
Alabama Defense Lawyers
Association

c/o P.O. Box 123
Mobile, Alabama 36601

Amicus for Appellant, Aetna
Life Insurance Co.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of August served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed and first class postage prepaid.

Davis Carr

Davis Carr

Supreme Court, U.S.
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No. 84-1601 (19)

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE AND
ROBERT L. LAVOIE, SR.,
Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ALABAMA

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, FARMERS INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, THE STATE FARM INSURANCE COMPANIES, AND TRUCK INSURANCE EXCHANGE AS AMICI CURIAE IN SUPPORT OF APPELLANT

HORVITZ & LEVY
*Ellis J. Horvitz
Jay M. Kohorn
16000 Ventura Boulevard, Suite 401
Encino, California 91436
(818) 995-0800 and (213) 872-0802
Attorneys for Amici Curiae
in Support of Appellant

*Counsel of Record

Lawyer's Brief Service, Inc. / Legal Publishers / (213) 383-4457

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No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE AND
ROBERT L. LAVOIE, SR.,
Appellees.

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, FARMERS INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, THE STATE FARM INSURANCE COMPANIES, AND TRUCK INSURANCE EXCHANGE AS AMICI CURIAE IN SUPPORT OF APPELLANT

With consent of the parties, the American Insurance Association, the National Association of Independent Insurers, Farmers Insurance Exchange, Fire Insurance Exchange, the State Farm Insurance Companies, and Truck Insurance Exchange respectfully submit this brief as amici curiae in support of the Appellant.

INTEREST OF AMICI CURIAE

The American Insurance Association ("AIA") is a national trade association of approximately 175 property and casualty insurance companies. AIA's member companies account for approximately 25% of the property and casualty insurance written in the United States.

The National Association of Independent Insurers ("NAII") is the nation's largest property and casualty insurance trade association with more than 500 member companies. NAII members write nearly 40% of the property and casualty insurance in force in the United States.

Farmers Insurance Exchange, Fire Insurance Exchange and Truck Insurance Exchange are members of the sixth largest property and casualty organization in the United States. Together they are the nation's third largest underwriter of automobile and homeowner's insurance.

The State Farm Insurance Companies ("State Farm") are a group of insurance companies composed of State Farm Mutual Automobile Insurance Company and its wholly-owned subsidiaries and affiliates. The State Farm Insurance Companies together constitute the nation's largest property and casualty insurer, accounting for approximately 10% of the property and casualty insurance in force in the United States.

Amici are concerned that the pervasive and growing availability of punitive damages and the geometric increase in the size of punitive awards in recent years is fundamentally warping the compensatory function of the civil litigation system and is converting it into a punitive/windfall system. Unchecked, this trend threatens the capacity of the insurance industry to provide liability

insurance to the public at an affordable cost, and, as a consequence, to provide a source of funds from which to compensate injured claimants.[1]

More pertinent to this case, the insurance industry is concerned that with increasing frequency they and their insureds are the victims of large punitive damage awards which far exceed any known criminal fines. These harsh sanctions are imposed without the additional constitutional safeguards afforded criminal defendants and without any meaningful guidelines or limits as to their amounts. Nominally civil, punitive damages in purpose and effect are penal sanctions and are indistinguishable from criminal fines. Simply put, we are witnessing the emergence in our civil courts of a parallel system of criminal punishment without safeguards or limits. This, we submit, is constitutionally repugnant. We ask this Court to intervene and bring amici, their insureds and other victims of punitive damage awards within the ambit of constitutional protection.

SUMMARY OF ARGUMENT

In this brief, amici will briefly describe the dimensions of the punitive damage problem in terms of the rapidly growing number of punitive damage awards and the extraordinary increase in the size of these awards. Thereafter, we will demonstrate that under well-established principles punitive damages are criminal penalties and, as such, the current procedures under which the vast majority of the states impose these damages are constitutionally

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[1] Rightly so, the insurance industry has been called the banker of the tort system.

deficient. We will also demonstrate that, at the very least, punitive damages are sufficiently criminal in nature as to warrant granting punitive damage defendants additional constitutional protections not presently afforded in most civil cases. Finally, we will argue that the method by which punitive damages are determined in the great majority of states, without guidelines or limits, deprives defendants of due process of law.

INTRODUCTION: THE DIMENSIONS OF THE PUNITIVE DAMAGES PROBLEM

Forty-six states allow punitive damages in civil cases. 1 J. Ghiardi & J. Kircher, *Punitive Damage Law & Practice* § 4.16, at 18-22 (Supp. 1984). In 41 of these states, including Alabama, punitive damages have no compensatory aspect whatsoever; they are inflicted *solely* to punish and/or deter. *Id.*; *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) ("Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence' " (quoting *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 350 (1974)). In these states, "[t]he objectives of an award of punitive damages are the same as those which motiviate the criminal law. . . . " *Mattyasovszky v. West Towns Bus Company* 61 Ill.2d 31, 35, 330 N.E.2d 509, 511 (1975.)[2]

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[2] *See also Abel v. Conover*, 170 Neb. 926, 931-33, 104 N.W.2d 684, 688-90 (1960); *Campen v. Stone*, 635 P.2d 1121, 1131 (Wyo. 1981); *Cox v. Theus*, 569 P.2d 447, 450 (Okla. 1977); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 188-89, 384 N.E.2d 353, 359-60 (1978).

Numerous courts and commentators have expressed concern that these penal sanctions are imposed without the additional safeguards traditionally afforded defendants in criminal cases.[3] The Washington Supreme Court cogently expressed these concerns over 90 years ago in *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 52, 25 P. 1072, 1074:

> [In actions for punitive damages] many of the time-honored rules governing the trial of criminal actions, and of the rights that have been secured to defendants in criminal actions . . . are absolutely ignored. . . . The fallacy and unfairness of the position is made manifest when it is noted that a person can be . . . [held liable for punitive damages], the penalty for which is unlimited save in the uncertain judgment of the jury, and fined to this unlimited extent for the benefit of an individual who has already been fully compensated in damages on a smaller weight of testimony than he can be in a criminal action proper, brought for the benefit or protection of the state,

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[3] *See, e.g., Fay v. Parker*, 53 N.H. 342, 386-97, 16 Amer. Rep. 270, 319-32 (1872); *Mattyasovszky*, 61 Ill.2d at 35-36; *Ness v. Hocks*, 272 Or. 210, 219-21, 536 P.2d 512 (1975); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 51-52, 25 P. 1072, 1073-74 (1891); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 300, 294 N.W.2d 437, 458 (1980); Grass, *The Penal Dimensions of Punitive Damages*, 12 Hast. Const. L.Q 241 *passim*; Wheeler, *The Constitutional Case For Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269, 322-51 (1983); Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U.Chi.L.Rev. 408, 434 (1967); McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 Depaul L.Rev. 571, 582-84 (1978), Peters, *Punitive Damages in Oregon*, 18 Willamette L.J. 369, 406-426 (1982).

> where the amount of the fine is fixed and limited by law. . . .

This Court has not yet had occasion to determine whether all of the safeguards afforded defendants in criminal trials are applicable in trials where punitive damages are at issue. Wheeler, *supra* note 3, at 273 n. 15. The results of the states' efforts in this regard are mixed: A few states have found the absence of safeguards compelling and thus have disallowed punitive damages altogether.[4] Several states allow defendants some, but not all, of the protections traditionally afforded in criminal or "quasi-criminal" trials.[5] Most states, including Alabama, offer

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[4] *See Barr v. Interbay Citizens Bank* 96 Wash.2d 692, 699-70 (1981); *Vratsenes v. New Hampshire Auto, Inc.*, 112 N.H. 71, 72-73, 389 A. 2d 66 (1972); *Fay*, 53 N.H. at 386-97, 16 Amer. Rep. at 319-32.

[5] Nine states, for example, raise the standard of proving entitlement to punitive damages from "preponderance of the evidence" to either "beyond a reasonable doubt" or variations of the "clear and convincing evidence" standard: Colorado (Colo. Rev. Stat. § 13-25-127 (1973)); Indiana (*Travelers Indemnity Co. v. Armstrong* 442 N.E.2d 349, 358-63 (Ind. 1982)); Maine (*Tuttle v. Raymond*, 54 L.W. 2035 (June 21, 1985)); Minnesota (Minn. Stat. Ann. § 549.20 (1985)); Montana (Mont. Code Ann. § 27-1-221(2) (1985)); Oregon (Or. Rev. Stat. § 30.925 (1983)); New York (*Roginsky v. Richardson-Merrell, Inc.* 378 F.2d 832, 843 (2d Cir. 1967)); Wyoming (*Cosgriff Bros. v. Miller* 10 Wyo. 190, 237, 68 P. 206, 217 (1902)); Wisconsin (*Wangen*, 97 Wis.2d at 300, 294 N.W. 2d at 458).

At least three states (Arizona, Georgia, and Maine) attempt to cure potential double jeopardy problems by allowing triers of fact to consider the existence of prior criminal sanctions in exercising their discretion to award punitive damages. *Puz v. McDonald*, 140 Ariz. 77, 78-79, 680 P.2d 213, 214-15 (Ct. App. 1984); *White v. Taylor*, 157 Ga.App. 328, 329, 277 S.E.2d 321, 322 (1981); *Hanover Insurance Co. v. Hayward*, 464 A.2d 156, 159 (Me. 1983).

At least two states (New York, and Wyoming) allow a bifurcated trial

punitive damage defendants no additional protections.

In addition, the absence of meaningful standards to govern the amount of punitive awards has been a matter of concern.[6] While this Court has not yet directly addressed this concern, it has acknowledged that the absence of standards is a problem. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.")

Until recent years, the problems of inadequate procedural safeguards afforded punitive damages defendants and the lack of meaningful standards to govern the amounts of punitive damage awards have received less attention because "punitive damages awards occurred infrequently, their size, when they did occur, was relatively small, and the cases in which they occurred involved, by and large, some of the most egregious forms of intentional torts. " 2 J. Ghiardi & J. Kircher, *supra* p. 4, at § 22.01, p. 1. Today, however, all this has changed — dramatically. Juries are now imposing enormous punitive damages awards with great frequency in conjunction with an ever-increasing variety of claims.

Huge punitive damages awards are now commonplace. In California, since January 1, 1983, juries have awarded punitive damages in at least 240 cases, with verdicts totaling approximately $450 million. In 118 of these cases, the punitive damage award was $100,000 or more; in 38 the

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- one phase for liability and compensatory damages, a second (or "penalty") phase for punitive damages *Rupert v. Sellers*, 368 N.Y.S.2d 904, 912 (1975); *Campen*, 635 P.2d at 1132.

[6] *See* Wheeler, *supra*, note 3, at 288, 290-91.

award equalled or exceeded $1 million.[7] In the first six months of 1985, five California juries have awarded $242 million in punitive damages alone: *Micro/Vest v. Computerland*, No. 545255-4 (Alameda County Superior Court) ($125 million); *Haun v. N.E.C. Microcomputer, Inc.*, No. 175898 (Santa Clara County Superior Court) ($46 million); *Jewell v. Bank of America*, No. 112-439 (Sonoma County Superior Court) ($35 million); *Tan Jay International, Ltd. v. Canadian Indemnity Co.*, No. C 485516 (Los Angeles Superior Court) ($26 million); and *Rice Growers, Assn. v. Transamerica Delaval, Inc.*, No. 766-754 (San Francisco County Superior Court) ($20 million).[8]

California's experience is paralleled in other states. In Cook County, Illinois, for example, the average punitive damages award (measured in 1984 dollars) increased from $4000 in the period 1960-64, to $489,000 in the period 1980-84.[9] In the past year and one-half, juries awarded $100 million in Texas (*Durrill v. Ford Motor Co.*, No. 79-3203 (28th Texas District Court, 1984)); $39 million in Oregon (*Christofferson v. Church of Scientology*, No. A779495184 (Multnomah County Circuit Court, 1985)); $25 million in New Jersey (*Guarrere v. Cessna Aircraft Co.*, No. 80-3285 (United States District Court, D.N.J., 1984)); and $22

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[7] These figures were compiled from a review of volume 27, no. 1 through volume 29, no. 36 of Jury Verdict Weekly, Inc.'s publication *Jury Verdicts Weekly*. This publication reports approximately 80-85 percent of all jury verdicts in California. *See* M. Shanley, M. Peterson, Rand Institute for Civil Justice, *Comparative Justice - Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980* 80 (1983).

[8] A number of these awards have been reduced either by the trial or appellate courts.

[9] M. Peterson/Rand Institute for Civil Justice, *Punitive Damages: Preliminary Empirical Findings* (No. WD-2714-ICJ) 13 (1985) [hereinafter cited as Peterson/Rand].

million in Illinois (*Duddleston v. Syntex Laboratories, Inc.*, No. 80-L-577 (Cook County Circuit Court, 1985)).

As numerous courts and commentators have recognized, in recent years punitive damage awards have greatly increased in frequency as well as magnitude.[10] In 1980-81 "[t]here were more punitive damages awards . . . than in the entire history of the United States." *Symposium: Punitive Damages*, 56 S.Cal.L.Rev. 155, 160 (1982). In Cook County, Illinois, in the period from 1960 to 1984, the number of punitive damage awards increased 1,800 percent. Peterson/Rand, *supra* note 9, at 11. In San Francisco County, California, the increase was some 350 percent. *Id.*

Punitive damages are also awarded in a greater variety of cases than ever before. In fact, "[t]hey are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago." Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S.Cal.L.Rev. 133, 133 (1982). In business tort and breach of contract cases, for example, punitive damage awards have increased 3,000 percent in Cook County, Illinois, and 1,000 percent in San Francisco County, California, in the period 1960-1984. Peterson/Rand, *supra* note 9, at 23. In 1980, Justice Elkington of the California Court of Appeal expressed his fear that "the law of punitive damages as it has developed in this state no longer serves any public policy, or the legitimate interests of the unentitled recipients of its constantly accelerating largess." *Rosener*, 110 Cal.App.3d

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[10] *See, e.g., Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740, 762, 168 Cal.Rptr. 237, 250 (1980) (Elkington, J., concurring); Priest, *Punitive Damages and Enterprise Liability*, 56 S.Cal.L.Rev. 123, 123 (1982); Wheeler, *supra* note 3, at 271; 2 J. Ghiardi & J. Kircher, *supra* p. 4, at § 21.01, p. 1.

at 758, 168 Cal.Rptr. at 248. Noting "the present-day practice of seeking punitive damages in substantially *all* damage actions," Justice Elkington concluded:

> Thus in a sense we, even the most prudent among us, are constantly threatened by an immovable and treacherous Sword of Damocles. For a misguided act or perhaps the misguided verdict of a jury any of us . . . is subject to possible visitation of disaster.

Id. at 762-63, 168 Cal.Rptr. at 251.

We urge this Court to sheath the punitive damages "Sword of Damocles" by requiring additional procedural protections and meaningful standards to govern the amount of punitive awards. We turn first to the question of procedural protections.

LEGAL DISCUSSION

A. PUNITIVE DAMAGES ARE CRIMINAL PENALTIES IN BOTH NATURE AND EFFECT.

The distinction between a civil penalty and a criminal penalty is constitutionally significant. *United States v. Ward*, 448 U.S. 242, 248 (1980). When a state sanctions a defendant "for the purposes of punishment" rather than as "an incident of some other legitimate governmental purpose," *Bell v. Wolfish*, 441 U.S. 520, 538 (1979), due process requires that significantly greater procedural safeguards be accorded the defendant than are required in ordinary civil trials. *Ward*, 448 U.S. at 248. This is true even when the penalty takes the form of an economic sanction. *Id.* at 244-49. So long as it is designed primarily to punish, a

fine or other economic sanction may not be imposed without according the defendant additional procedural safeguards. *Id.* at 248-254.

The question whether a penalty imposed by statute is civil or criminal (i.e., whether it is primarily designed to punish or to serve some other purpose) is a matter of both legislative intent and statutory effect. As explained in *Ward*, 448 U.S. at 248-49:

> Our inquiry . . . [into whether a penalty is civil or criminal has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [Citations.] Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

Thus, the purpose and effect of a punitive statute controls whether it is characterized as criminal or civil.

To determine whether the punitive damage laws in Alabama and most other jurisdictions provide sanctions so punitive in purpose and effect as to constitute criminal penalties, we turn to the seven criteria listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69(1963):

> [T]he tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character. . . . [are:] [1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will

> promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . . (Footnotes omitted.)

We are aware that these criteria are "neither exhaustive nor conclusive on the issue." *Ward*, 448 U.S. at 250. Nevertheless, as we now demonstrate, the *Kennedy* criteria, as applied in Alabama and the vast majority of other jurisdictions, strongly point in the direction of punitive damages constituting criminal penalties.

1. Punitive Damages Involve An Affirmative Disability Or Restraint.

One of the primary goals of the criminal law is deterrence. To the extent an economic sanction fosters this goal, rather than the goal of compensation, it partakes of the character of a criminal law. In *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n*, 518 F.2d 990, 1001 (5th Cir. 1975), the Court of Appeal concluded that a fine imposed for the purpose of deterring future misconduct and compelling compliance with OSHA safety standards constituted a "restraint" under the *Kennedy* test. Since punitive damages constitute "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence," *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 48, they necessarily also constitute "restraints" under this test. Thus, this criterion favors interpreting punitive damages as criminal penalties.

2. Punitive Damages Have Historically Been Regarded As Punishment.

With the exception of a few jurisdictions which limit punitive damages to compensation for specified injuries,[11] punitive damages in this country[12] have historically been regarded as serving one purpose and one purpose only — punishing defendants and making examples of them.[13] Early Alabama cases explicitly stated that punitive damages

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[11] In the handful of states which characterize punitive damages as compensatory, the term "punitive" is largely a misnomer. In Connecticut, for example, punitive damages are limited to the plaintiff's costs of litigation less taxable costs. *Doroszka v. Lavine*, 111 Conn. 575 578, 150 A. 692, 693 (1930). Thus, "the purpose of exemplary damages and the rules for their determination [in that state] indicate that they are essentially compensatory, not punitive, in fact and effect." *Lanese v. Carlson*, 32 Conn.Supp. 163, 167, 344 A.2d 361, 364 (1975). Georgia has the unique rule that punitive damages are allowed to compensate for the "wounded feelings" of the plaintiff or to deter the defendant, but not both. *See Westview Cemetery Inc. v. Blanchard*, 234 Ga. 540, 543-46, 216 S.E.2d 776, 779-80 (1975).

[12] At English common law punitive damages served dual purposes: to punish the defendant and deter future misconduct (*see, e.g., Wilkes v. Wood*, 98 Eng.Rep. 489, 498-99 (C.P. 1763); *Huckle v. Money*, 95 Eng.Rep. 768, 769 (C.P. 1763)), and to compensate the plaintiff for such intangible losses as wounded feelings and injuries to pride. 2 F. Pollock & F. Maitland, *The History of English Law* 537 (2d ed. 1909).

In England and a vast majority of United States jurisdictions, as tort law has expanded to include compensation for pain, suffering, and emotional distress, the compensatory element of punitive damages has fallen by the wayside. *See Cassell & Co. Ltd. v. Broome* [1972] A.C. 1027, 1029 (H.L.); 12 *Halsbury's Laws of England* 470-471, 474-75 (4th ed. 1975); 1 J. Ghiardi & J. Kircher, *supra* p. 4, at § 4.16, p. 18-22.

[13] Even the earliest of American cases assessing exemplary damages show the "vindictive" nature of this type of sanction. *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784); *Wilson v. Middleton*, 2 Cal. 54, 57 (1852).

were awarded solely to punish the wrongdoer and deter wrongful conduct in the future. *See Birmingham Waterworks Co. v. Keiley*, 2 Ala.App. 629, 637-38, 56 So. 838, 841 (1911); *Bowles v. Lowery*, 5 Ala.App. 555, 559, 59 So. 696, 697 (1912).

The "punitive" character of such damages is noted in the Restatement (Second) of Torts § 908 (1979):

> The purposes of awarding punitive damages, or "exemplary" damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future.

3. Punitive Damages Come Into Play Only On A Finding Of Scienter.

In analyzing the distinction between a civil and penal sanction, one of the relevant factors courts have focused on is whether imposition of the sanction hinged on the defendant's state of mind. In *Child Labor Tax Case*, 259 U.S. 20 (1921), for example, the Court determined that a tax imposed only on employers who *knowingly* employed children under 14 years of age was, in light of this *mens rea* requirement, a penal sanction. This Court explained that "[s]cienters are associated with penalties, not taxes." 259 U.S. at 37. Since "[a]ll jurisdictions require some element of 'knowing wrongdoing' to justify awards of punitive damages," Grass, *supra* n. 2, at 270-71,[14] this criterion also

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[14] In Alabama punitive damages may be awarded where the wrongful act is maliciously perpetrated or done knowingly, wantonly, and recklessly, under such circumstances as to indicate that the wrongdoer knew the act would probably injure persons or property, or where the act was so grossly negligent, oppressive, or fraudulent as to amount to

favors interpreting punitive damages as criminal in nature.

4. Punitive Damages Promote The Traditional Aims Of Punishment — Retribution and Deterrence.

As this Court has explicitly recognized, punitive damages in Alabama and the vast majority of jurisdictions promote retribution and deterrence through punishment. *Gertz*, 418 U.S. at 350 (punitive damages serve "to punish reprehensible conduct and deter its future occurrence"); *see also Birmingham Waterworks Co. v. Keiley*, 2 Ala.App. at 37-38, 56 So. at 41; *Ex Parte Clare*, 456 So. 2d 357, 358 (Ala. 1984). Hence, this criteria also favors interpreting punitive damages as penal in nature.

5. The Behavior To Which Punitive Damages Are Applied Is Often Also Proscribed By The Criminal Law.

Where civil laws are used to penalize activities which are also proscribed by the criminal law, this Court has ruled that these "civil" sanctions cannot be levied without according defendants greater procedural protections than normally apply in civil cases. *See, e.g., Lipke v. Lederer*, 259 U.S. 557, 562 (1922), (cited with approval in *Kennedy*, 372

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malice. *Bowles v. Lowery*, 5 Ala.App. at 559, 59 So. at 697. The minimum standard is "gross negligence," i.e., such a lacking in care as would raise the presumption that the defendant is conscious of the probable consequences of his carelessness and indifferent to the danger of injury to the person or property of others. *Alabama Power Co. v. Dunlap*, 240 Ala. 568, 200 So. 617, 621 (1941).

U.S. at 168, n. 26); *United States v. La Franca*, 282 U.S. 568, 575 (1931) ("[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punishment proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action.") Since punitive damages are frequently awarded against defendants for conduct which is already proscribed by the criminal law,[15] this criterion also supports interpreting punitive damages as criminal in nature.

6. Punitive Damages Serve No Purposes Other Than Punishment and Deterrence.

The characterization of a law as criminal or civil also turns on the purpose it is designed to serve. Civil sanctions which serve only to punish and deter are deemed to be penal; on the other hand, where sanctions serve both a punitive and nonpunitive purpose, some courts have concluded that these sanctions should not be treated as penal in nature. *See United States v. Ward*, 448 U.S. at 250; *Atlas Roofing Co. v. Occupational S & H Rev. Com'n*, 518 F.2d at 1010.

Punitive damages, however, serve no purpose other than to punish and deter. They are unrelated to any injury, expense, or cost of the plaintiff. *See Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 48; *see* footnote 1 *supra* and accompanying text.[16]

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[15] "There is no doubt that many punitive damages verdicts are premised on criminal deportment." Grass, *supra* note 3, at 291.

[16] "[W]hile punitive damages might provide an incentive to prosecute suits in society's interest, justifying them on this ground clearly

Other penalties such as treble damages under the Clayton Antitrust Act (15 U.S.C. § 15) and the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-1968) serve as a useful contrast to punitive damages.[17] These penalties bear a legislatively-determined ratio to actual damages and serve many purposes other than those served by punitive damages. For example, they act as "liquidated damages" to cover litigation costs or to compensate for speculative injuries. *Rex Trailer Company v. United States*, 350 U.S. 148, 153-54 (1956); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 854-57 (8th Cir. 1952) *cert. denied*, 343 U.S. 942 (1952). One of the focuses of the treble damage provisions thus is on compensation of injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 828 (9th Cir. 1963). Since the foregoing penalties serve both punitive and non-punitive functions, they are appropriately characterized as civil. *See U.S. v. Ward*, 448 U.S. at 250; *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n*, 518 F.2d at 1010.

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acknowledges that the doctrine furthers the punitive ends of criminal law." Gross, *supra* note 3, at 301.

The incentive theory is also contradicted by the disfavored status of such awards. *See Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). *See also Rosener v. Sears Roebuck & Co.*, 110 Cal.App.3d 740, 750, 168 Cal.Rptr. 237, 242 (1980); *Lewiston Pistol Club, Inc. v. Imthurn*, 94 Idaho 264, 266, 486 P.2d 275, 277 (1971); *McElwain v. Georgia-Pacific Corp.*, 245 Or. 247, 249, 421 P.2d 957, 958 (1966).

[17] *See Sedima v. Haroco*, ___U.S.___, 53 L.W. 5034 (July 1, 1985). *See also Wahba v. H & N Prescription Center, Inc.*, 539 F.Supp. 352, 356 (E.D.N.Y. 1982).

Punitive damages, on the other hand, focus solely on punishing the wrongdoer rather than compensating the victim, and as the instant case attests, often bear no relationship to actual damages. Indeed, they are often awarded in conjunction with only nominal compensatory damages. Because of their limited purposes, this factor also supports characterizing punitive damages as penal.

7. Even If Punitive Damages Served An Alternate Purpose (They Do Not), They Are Excessive In Relation To Any Such Purpose.

Punitive damages serve no purpose other than to punish and deter. However, even if some other purpose could be formulated, the proliferation of huge awards nationwide discloses a pattern of excess unrelated to any legitimate purpose. For example, in the present case, a $3,500,000 punitive damage award is far beyond anything which could be justified when the actual injury is worth less than $1,700.[18]

In sum, punitive damages are intended to be and are in fact solely penal in nature; They have as their objectives retribution and deterrence. As this Court noted in *Bell v. Wolfish*, 441 U.S. at 539 n. 20, "[r]etribution and deterrence

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[18] In Alabama, punitive damages need not bear any particular relationship to actual damages. *Carroll Kenworth Truck Sales, Inc. v. Leach*, 396 So. 2d 1044, 1046 (Ala. 1981). Punitive damage awards are not reversed on appeal unless they shock the judicial conscience. *U-Haul Co. of Alabama v. Long*, 382 So. 2d 545 (Ala. 1980). The disparity between $1,700 and $3,500,000 did not shock the conscience of the Alabama Supreme Court.

are *not* legitimate non-punitive governmental objectives." When the civil law inflicts punishment through punitive damages it acts as the surrogate of the criminal law. Accordingly, a defendant facing punitive damages should be entitled to the constitutional safeguards which due process demands whenever punishment is meted out in the criminal system. This is especially true today, when, as shown above, punitive damage awards in some jurisdictions average nearly $500,000, and multi-million dollar awards are commonplace.[19]

B. EVEN IF PUNITIVE DAMAGES ARE CONSTRUED AS "CIVIL" PENALTIES, PUNITIVE DAMAGE DEFENDANTS SHOULD BE AFFORDED ADDITIONAL PROCEDURAL PROTECTIONS.

Due Process requires that extraordinary procedures be employed in certain civil contexts. *See Addington v. Texas*, 441 U.S. 418, 427 (1979). In this section we will demonstrate that two such procedures — elevated standards of proof and trial bifurcations — should be applied to punitive damage actions, regardless of whether punitive damages are characterized as civil or criminal penalties. These two protections have thus far been afforded punitive damage defendants in only a few states.

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[19] *See* text accompanying footnotes 6 and 7.

1. A Higher Standard Of Proof Than Preponderance Of The Evidence Is Necessary To Lower The Risk Of Unwarranted Punishment.

As noted above, several states have adopted higher standard of proof requirements for punitive damages than the "preponderance of evidence" or "greater weight of the evidence" standard which governs the normal compensatory aspects of civil law. Colorado has enacted legislation requiring proof "beyond a reasonable doubt." Colo. Rev. Stat. § 13-25-127 (2) (1973). Other states, recognizing the "quasi-criminal" nature of punitive damages, require proof bu variations of the "clear and convincing" evidence standard.[20]

The Indiana Supreme Court, in mandating that punitive damages in that state be proven by "clear and convincing evidence," observed that due process may require a higher standard of proof where "fundamental rights are involved and the legal and social ramifications of the civil proceeding are serious." *Travelers Indemnity Company v. Armstrong*, 442 N.E.2d 349, 362 (1982). In explaining the necessity of a higher standard of proof in punitive damages cases, the court reasoned as follows:

> We have repeatedly said that . . . [punitive] damages may be awarded in an appropriate case, as a punishment for the offense and to deter similar misconduct. It has never been implied that a plaintiff has any entitlement to such damages. Rather, he is merely the fortunate recipient of the "windfall." It cannot be said, therefore, that a

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[20] *See* footnote 5, *supra*.

plaintiff seeking such a bonus is denied any right, if he be held to a degree of proof higher than is required in other actions. In fact, it is incongruous to permit a recovery of that to which there is no entitlement upon evidence that barely warrants a recovery of that which is the plaintiff's absolute right. Yet, that is precisely what may occur when the inference of obduracy, from which punitive damages may flow, is permissible, but not compelled, from the same conduct from which compensatory damages flow, as a matter of right. To avoid such occurrences, punitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness. Rather some evidence should be required that is inconsistent with the hypothesis that the tortious conduct was the result of a mistake of law or fact, honest error of judgment, over-zealousness, mere negligence or other such noninquitous human failing. For, just as we agree that it is better to acquit a person guilty of crime than to convict an innocent one, we cannot deny that, given that the injured party has been fully compensated, it is better to exonerate a wrongdoer from punitive damages, even though his wrong be gross or wicked, than to award them at the expense of one whose error was one that society can tolerate and who has already compensated the victim of his error. The public interest cannot be served by a policy that favors the latter over the former. And, just as the requirement of proof beyond a reasonable doubt furthers the public interest with respect to criminal cases, a requirement of proof

by clear and convincing evidence furthers the public interest when punitive damages are sought. *Id.* at 362-63.[21]

2. A Bifurcated Trial Is Necessary To Protect Defendants From Unnecessary Prejudice.

When punitive damages are at issue, the absence of bifurcation may have a measurable effect on the defendant's constitutional right to a fair trial free from prejudice or bias. Many jurors come to a trial resenting the size and wealth of corporate defendants. Evidence of that wealth, which is irrelevant to the issues of liability and compensatory damages, may therefore be highly prejudicial to the defendant.[22] A workable solution to this problem is a split-trial procedure in which the amount of punitive damages is not examined until after the trier-of-fact has determined punitive damages are warranted. In such a

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[21] A heightened standard of proof may also combat the inherent prejudices many jurors have against large and wealthy corporate defendants. Owen, *Problems in Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U.Chi.L.Rev. 1, 58-59 (1982).

[22] "[I]t is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare. Such evidence may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function." Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1191 (1931).

procedure, a trial on the merits would explore both the underlying claim and the demand for punitive damages. If the facts are found to merit punitive damages, a separate proceeding would determine the amount. In addition, the defendant's financial information would not be admissible until after such an affirmative special verdict.

The split-trial procedure strikes a balance between the needs of the plaintiff and the rights of the defendant to a fair trial.[23]

C. IN ALABAMA AND THE VAST MAJORITY OF STATES NO MEANINGFUL STANDARDS GOVERN THE AMOUNT OF A PUNITIVE PENALTY. ABSENT THESE STANDARDS THE PENALTY IS UNDULY VAGUE IN VIOLATION OF DUE PROCESS.

This Court has recognized, "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz*, 418 U.S. at 350; see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981).[24] Like most other

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[23] In *Campen v. Stone*, 635 P.2d 1121, 1131 (Wyo. 1981), the court commented that a bifurcated trial on compensatory and punitive damages: "makes good sense. The plaintiff receives an appropriate redress for the wrongs he has suffered, the defendant is provided a prejudice-free atmosphere in which his liability may be assessed, and our society's interest in effecting punishment and deterrence for socially outrageous conduct is preserved."

[24] "Once it has found the requisite malice and has decided to award

states, Alabama sets no meaningful limit on the *amount* of the punitive penalty which may be imposed. The jury can award any amount it sees fit. *Yeager v. Hurt*, 433 So.2d 1176, 1181 (Ala. 1983).[25]

A few state courts have noted the incongruity between precise maximums set for criminal fines and the absence of any similar limits for punitive damage awards. *Mattyasovszky v. West Town Bus Co.*, 61 Ill.2d at 35, 330 N.E.2d at 511-12 ("The maximum and minimum amounts of the fine imposed by way of punishment and deterrence in a criminal case are fixed by statute. In the civil case, however, the jury is left at large to take from the defendant and deliver to the plaintiff such amounts as it sees fit"); *Brown v. Swineford*,

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some punitive damages, the jury in a discretionary punitive damages case receives no guidance with respect to the appropriate measure of punitive damages. Specifically, the law provides no guidance as to what constitutes appropriate punishment or what factors the jury should consider in deciding how much deterrence is desirable. . . . This complete absence of standards and guidance creates a serious risk of error in determining the size of punitive damages awards." Wheeler, *supra* note 3, at 285.

Cognizant of this risk, one state has recently adopted a limitation on punitive damages of $25,000 or 1% of the net worth of the defendant, whichever is greater. Mont. Code Ann. § 27-1-221(6) (1985).

[25] The Alabama appellate courts do little to rein in the jury's unlimited discretion, finding punitive awards excessive only "if they shock the judicial conscience or are so great as to indicate they are the product of sympathy, passion, or prejudice." *Village Toyota Co., Inc. v. Stewart*, 433 So.2d 1150 (Ala. 1983). "Appellate review . . . does little to minimize the risk of erroneous results in the present system, because the appellate process also lacks clear, consistent standards. . . ." Wheeler, *supra* note 3 at 288.

Further, in Alabama, the 10 percent penalty imposed by law on a losing appellant discourages seeking appellate review in the first place. Ala. Code § 12-22-72 (1975).

44 Wis. 282, 286 (1878) ("while the statute limits the pecuniary fine upon criminal prosecution for such an action, there is but vague limit to the punitory damages which a jury may find in a civil act. It certainly appears to be an incongruity . . .").

While this Court held in *Smith v. Wade*, 461 U.S. 30, 49 (1983), that a "recklessness" standard for determining *liability* for punitive damages is not "too vague to be fair or useful," as yet this Court has not addressed whether standards governing determination of the *amount* of a punitive award are sufficiently precise to pass due process muster. The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), where this Court said, inter alia:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges . . . and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (Footnotes omitted.)

Prevention of arbitrary and discriminatory enforcement is recognized to be "the more important aspect of the vagueness doctrine." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). It has application to standards for determining a penalty as well as liability. *See United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute").

"The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair

enforcement — depends in part on the nature of the enactment." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender* 461 U.S. at 359 n.8. Here, as explained above, punitive damages in purpose and effect impose a criminal penalty. Even if punitive damages properly could be considered civil in nature (they cannot), the present reality of enormous awards — far in excess of any fine which can be levied under existing criminal laws — means there is no room to tolerate vagueness. The consequences of imprecision, albeit financial, are frequently draconian.

This Court also has recognized that punitive damages are susceptible to the vice of arbitrary and discriminatory enforcement, the primary evil which the vagueness doctrine addresses. "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50-51 n. 14. The "unpopular defendants" in this context are frequently those with wealth, primarily corporations, especially insurance companies. "It is a good guess that rich men [corporations] do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *supra* note 1, at 1191. The need for specific standards to guide jury discretion in order to prevent punitive awards which are arbitrary and discriminatory in amount is apparent.

At bottom, one is hard pressed to devise a penalty more vague and destructive than that permitted by the states' punitive damages laws. There is no essential difference between these laws and a criminal fine without an upper limit. We are confident this Court would not countenance a law imposing a limitless fine. Neither should it countenance

these limitless punitive damages laws under which juries have rendered the incredible verdicts described earlier in this brief.

CONCLUSION

For the foregoing reasons amici respectfully request that this Court examine and reassess punitive damages in light of the due process principles we have discussed. Based on these principles, we submit the judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

HORVITZ & LEVY
*Ellis J. Horvitz
Jay M. Kohorn

Attorneys for the American Insurance Association, the National Association of Independent Insurers, Farmers Insurance Exchange, Fire Insurance Exchange, The State Farm Insurance Companies and Truck Insurance Exchange

**Counsel of Record*

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No. 84-1601

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

VS.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

On Appeal from the Supreme Court of Alabama

BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU AS AMICI CURIAE IN SUPPORT OF APPELLANT

JOSEPH W. ROGERS, JR.
MARTIN QUINN
*SUSAN M. POPIK
ROGERS, JOSEPH, O'DONNELL & QUINN
311 California Street
10th Floor
San Francisco, CA 94104
(415) 956-2828
Attorneys for Amici Curiae

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU AS AMICI CURIAE IN SUPPORT OF APPELLANT

INTRODUCTION

With the consent of the parties, the Association of California Insurance Companies ("ACIC") and the California State Automobile Association Inter-Insurance Bureau ("CSAA") respectfully submit this brief as *amici curiae* in support of appellant Aetna Life Insurance Company.

ACIC is an insurance trade organization comprised of 40 property-casualty insurers doing business in California, who collectively write policies accounting for approximately 30% of the property-casualty premiums in California.

CSAA is a reciprocal insurance exchange formed in 1914 to provide automobile insurance to California drivers at reasonable rates. CSAA currently has 830,000 policyholders and insures approximately 1.5 million automobiles. In 1985, it will write automobile insurance accounting for approximately $600 million in premiums in California.

INTEREST OF AMICI CURIAE

Amici's interest in this case arises from the California insurance industry's experience in recent years with the explosion in the size and number of punitive damage awards. Amici submit that this dual-front increase is due, in great measure, to the lack of guidelines given to juries by which they may determine whether punitive damages should be awarded and, if so, in what amount. Statistics demonstrating these California developments since the beginning of 1983 are included in, and appended to, this brief.

Amici believe that the propriety of allowing juries to impose multi-million dollar civil penalties without any consistent standards upon which to do so presents a problem of national scope and constitutional significance which this Court should address. Moreover, based on the commonly-held, though unscientific, theory that what happens in California today will be experienced by the rest of the nation shortly, amici submit that the grim reality demonstrated by the California statistics will not long be confined to this state. The result in this very case is proof of that hypothesis. Amici urge this Court to assume jurisdiction herein, to adopt appellant's argument that the uncontrolled award of punitive damages violates both the Excessive Fine and Due Process Clauses of the Constitution of the United States, and to reverse the judgment of the Alabama Supreme Court.

SUMMARY OF DISCUSSION

In California, the frequency with which juries award punitive damages, and the sizes of those awards, has risen to an alarming level. Multi-million dollar awards are now commonplace. At the same time, there is no consistency among these awards based on any objective criteria.

There are no ascertainable standards in California by which a jury can determine whether an award of punitive damages should be made or, if an award is proper, the size of such award. The potential harm resulting from this unguided inquiry is compounded by recent developments in California which have greatly

expanded the availability of punitive damages to situations in which they have traditionally been foreclosed.

DISCUSSION

I

A STATISTICAL ANALYSIS OF PUNITIVE DAMAGE AWARDS FROM 1983 TO THE PRESENT DEMONSTRATES AN INCREASE IN THE SIZE AND NUMBER OF SUCH AWARDS

In the last few months, four juries in the San Francisco Bay Area have returned punitive damage awards of $20 million (San Francisco, March 1985), $125 million (Oakland, March), $46.5 million (San Jose, April), and $26.7 million (Sonoma County, July). A Los Angeles jury awarded $35 million in punitive damages in June. In a span of only five months, a total of over $253 million in punitive damages has been awarded in just five cases.

Startling though these figures may be, they are fully consistent with the general inclination of juries in California to award ever larger amounts of punitive damages in an increasing number of situations. As graphic illustration of this point, amici have attached to this brief as Appendix A a compilation of 211 California trial court punitive damage awards rendered between January 1, 1983 and July 19, 1985.[1] This appendix shows that during 1983, a total of 73 juries awarded $69,466,504 in punitive damage awards.

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[1] The primary source of the statistics in Appendix A is a private statewide publication, *Jury Verdicts Weekly*, which compiles for the benefit of California lawyers reports of jury verdicts in all California state and federal courts. *Jury Verdicts Weekly* does not purport to be a complete listing of every verdict in California since the publication depends on trial attorneys to submit the results of their cases. However, *Jury Verdicts Weekly* is recognized in California as the most authoritative existing source of information concerning verdicts and has been referred to as authority by California appellate courts. *See, e.g., River Garden Farms, Inc. v. Superior Court*, 26 Cal.App.3d 986, 998, 103 Cal.Rptr. 498 (1972). Information about five large verdicts too recent to be included in *Jury Verdicts Weekly* comes from newspaper articles.

In 1984, 112 juries awarded total punitive damages of $105,682,027. In the 26 cases reported so far this year in California, juries have returned punitive damage verdicts totaling $274,101,205. These verdicts may be further broken down according to size of verdict as follows:[2]

	$1,000-99,999		$100,000-999,999		$1 million +	
Year	No. of Cases	% of Total	No. of Cases	% of Total	No. of Cases	% of Total
1983	36	49%	26	36%	11	15%
1984	49	44%	43	38%	20	18%
1985	9	34%	8	31%	9	35%

Appendix A demonstrates a rather dramatic recent increase in the amount of punitive damage awards, whether analyzed in terms of average award or gross amount. The average award in 1983 was $951,596; in 1984 it was $943,589. In approximately the first quarter of 1985 it has been $10,542,354, or more than *ten times* the average for the previous year.

The gross amount of punitive damage awards reflects a comparable escalation. In 1983, the number of punitive damage awards of under $100,000 compared to those of $100,000 or over was approximately equal; in 1984, the ratio had risen slightly, but was still less than 1.3:1. In 1985, there are nearly twice as many awards over $100,000 as under that amount. A similar upward trend is seen in the awards of $1 million or over: in 1983, they comprised 15% of all punitive damage awards; in 1984, 18%. In 1985, that figure has nearly doubled, to 35%. The megaverdicts of $10,000,000 or more have risen even more abruptly in 1985: comprising only 4% of all punitive awards in 1983 (and less than 1% in 1984), they make up 23% of the 26 punitive damage awards reported so far in 1985.

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[2] Appendix A is divided into four parts: A.1, awards of $1,000 or more (but less than $100,000); A.2, awards of $100,000 or more (but less than $1,000,000); A.3, awards of $1,000,000 or more; A.4, Statistical Analysis Summary. For the larger awards reflected in parts A.2 and A.3, additional information has been provided concerning the nature of each case, the amount of compensatory damages and, where known, the results of trial judge and appellate court review of the verdict.

The huge increase in the size of punitive damage awards in early 1985 is not the result of one or two aberrations: the average of the top 15 punitive awards in each year has climbed from $4,232,832 in 1983, to $5,877,683 in 1984, and to $18,235,680 in 1985. Even if the $125,000,000 verdict is removed from the calculation, the average of the next 14 awards in 1985 is $10,609,657, or 80.5% more than the average in 1984 and 150% more than in 1983.[3]

II

THERE ARE NO ASCERTAINABLE STANDARDS BY WHICH A JURY CAN DETERMINE WHETHER TO AWARD PUNITIVE DAMAGES OR HOW LARGE ANY SUCH AWARD SHOULD BE

The basic difficulty confronting a jury deliberating on a request for punitive damages is the absence of any ascertainable standards by which to impose punishment or set an example. Judges imposing fines on criminal defendants are limited by strict statutory directions. In contrast, California juries must mete out punishment to civil defendants based solely on abstractions.

The first level of this abstraction is found in the statute which provides the primary authority for the imposition of punitive damages. California Civil Code section 3294(a) provides:

> In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

On its face, this statute provides no guidelines by which a jury may decide whether to award punitive damages other than the requirement that the defendant must have been "guilty of oppression, fraud, or malice." But these "requirements" mean little: the California Supreme Court has held that no matter how clear the

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[3] These statistics are summarized for the Court's convenience in Appendix A.4.

evidence of oppression, fraud, or malice, a plaintiff is never "entitled" to recover such damages:

> The granting or withholding of the award of punitive damages is *wholly within the control of the jury*, and *may not legally be influenced by any direction of the court* that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, *in the exercise of its untrammeled discretion*, has made the award.

Brewer v. Second Baptist Church of Los Angeles, 32 Cal.2d 791, 801, 197 P.2d 713 (1948) (emphasis added.).

Nor is the jury given any effective standards by which to determine the amount of punitive damages to be awarded once it has decided to award them. In *Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (1978), the California Supreme Court set forth three criteria for determining the proper size of a punitive damage award: (1) the nature and reprehensibility of the defendant's acts, (2) the amount of compensatory damages awarded, and (3) the wealth of the particular defendant. *Id.* at 928, 148 Cal.Rptr. at 399, 582 P.2d at 990. These criteria have since been incorporated into the standard instruction given to all California juries in punitive damage cases.[4] *See* BAJI, *California Jury Instructions, Civil*,

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[4] The standard punitive damages instruction reads as follows:

PUNITIVE DAMAGES—RECOVERY OF AND MEASURE

If you find that plaintiff suffered damage as a proximate result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against the defendant, for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of oppression, fraud, or malice in the conduct on which you base your finding of liability.

"Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or carried on by the defendant with a conscious disregard for the rights or safety of others.

14.71 (6th Ed. 1984). But other than these extremely vague (and completely subjective) standards, the jury is given no guidance by which to determine the size of a given award. The result must necessarily be inconsistent and potentially discriminatory punitive damage awards. A process more likely to violate basic substantive and procedural fairness can hardly be imagined.

While it is obviously impossible to demonstrate statistically how juries apply the "reprehensibility" requirement, one intermediate appellate court in California did undertake to analyze the "wealth" and "relationship" data in 16 punitive damage verdicts in business and insurance cases which have been reviewed on appeal. *See Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 393-96, 202 Cal.Rptr. 204 (1984). That analysis, which appeared as an appendix to the court's opinion, is attached to this brief as Appendix B. It demonstrates not only the *Devlin* court's conclusion that there is no "single formula for calculating punitive damages" [*id.* at 388]; it also makes plain that the

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"Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

BAJI, *California Jury Instructions, Civil*, 14.71 (6th Ed. 1984).

alleged criteria set out in *Neal* do not even provide a framework within which that calculation can be made.

As to the wealth criterion, the juries whose verdicts are reflected in Appendix B awarded punitive damages representing as little as 0.33% of defendant's net worth, or as much as 50%. There has been no higher degree of consistency in the relationship between compensatory and punitive damages: the cases listed in Appendix B show that even after consideration by the appellate courts the ratios range between 1.1:1 and 2000:1 (or more recently 190.5:1).

The thoughtful appellate judge who authored the *Devlin* opinion has described well the difficulties faced by juries in attempting to impose punitive damages under the vague guidelines of California law:

> The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns. The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter.

Id. at 388, 202 Cal.Rptr. at 208. And although the *Devlin* court concluded that "that is properly so" [*id.* at 388, 202 Cal.Rptr. at 209], the enormous awards rendered in the last few months are frightening reaffirmations of the degree to which the California judicial system has lost control of punitive damages.

It is true that the opportunity exists through a motion for new trial or an appeal to correct runaway jury verdicts. Cal. Code. Civ. Proc. § 657; *Cunningham v. Simpson*, 1 Cal.3d 301, 308, 81 Cal.Rptr. 855, 461 P.2d 39 (1969). Appendix B reflects that in 6

out of the 16 California cases listed by the *Devlin* court the punitive damage award was reduced or reversed as excessive at the trial court or appellate level. But this judicial control comes at a high price. Not only must the defendant incur additional attorneys' fees and expenses to challenge these punitive awards at the trial and appellate levels, but the defendant must post a bond of at least one-and-a-half times the amount of the award in order to obtain a stay of execution on appeal. Cal. Code Civ. Proc. § 917.1(b).[5]

III

THE COURTS HAVE GREATLY EXPANDED THE SITUATIONS IN WHICH PUNITIVE DAMAGES MAY BE AWARDED

The lack of procedural safeguards demonstrated above gains particular significance in view of several developments in California which have increased by geometric proportions the situations in which punitive damages may be awarded.

For nearly 100 years after California's punitive damage statute was enacted in 1872, punitive damage awards in California were limited to traditional tort cases; further limited to cases involving intentional torts; and even further limited to those cases in which the defendant had exhibited "malice," "oppression," or "fraud." While those statutory limitations remain intact, three important developments in California law have robbed them of any meaningful limiting effect.

A. California Courts Have Created a New Cause of Action for Tortious Breach of Contract

As early as 1958 the California Supreme Court stated that breach of the implied covenant of good faith and fair dealing in an insurance contract "sounds in both contract and tort." *Comunale*

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[5] In the case involving the $125,000,000 award, the defendants have been unable to post the required bond to obtain a stay of the judgment and have petitioned the Court of Appeal for a writ of supersedeas. California Court of Appeal, 1st Dist. No. A031998.

v. Traders & General Insurance Co., 50 Cal.2d 654, 328 P.2d 198 (1958). However, that concept of tortious breach of contract did not develop momentum or begin to impact the award of punitive damages until 1973 when, in *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973), the California Supreme Court held that this tort could be the basis of a direct action by the owner of an insurance policy against his or her insurer. Thus, notwithstanding the prohibition of punitive damages in cases "arising from contract," insureds suing their insurers for "tortious breach" of their insurance contracts were allowed to recover such damages. *Fletcher v. Western National Life Insurance Co.*, 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970); *see, e.g., Neal v. Farmers Insurance Exchange*, 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (1978); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 157 Cal.Rptr. 482, 598 P.2d 452 (1979), *cert. denied* and *appeal dism'd*, 445 U.S. 912 (1980). The development of the tort of "bad faith" breach of an insurance contract has itself accounted for much of the increase in the number of punitive damage awards during the last decade.

B. The Definition of Malice Has Been Diluted

The definition of "malice" in California for purposes of assessing punitive damages was formerly "malice in fact." *Davis v. Hearst*, 160 Cal. 143, 162, 116 P. 530 (1911). Thus, in order to recover punitive damages, a plaintiff had to prove that defendant had an intent to "vex, harass, annoy, or injure," since "evil motive is the controlling and essential factor which justifies such an award . . . ." *Id.* at 162, 116 P. at 539. This definition was accepted in most California decisions involving punitive damages. *See, e.g., Gombos v. Ashe*, 158 Cal.App.2d 517, 527, 322 P.2d 933 (1958); *Roth v. Shell Oil Co.*, 185 Cal.App.2d 676, 682, 8 Cal.Rptr. 514 (1960); *Ebaugh v. Rabkin*, 22 Cal.App.3d 891, 894-95, 99 Cal.Rptr. 706 (1972).

This stringent definition of "malice" was radically altered about ten years ago when the California Supreme Court shifted from a standard requiring that the defendant have intended to injure to one requiring merely that the defendant have acted "with a conscious disregard of plaintiff's rights" [*Silberg v. California Life Insurance Co.*, 11 Cal.3d 452, 462, 113 Cal.Rptr. 711, 521

P.2d 1103 (1974)]or with a "conscious disregard of the safety of others." *Taylor v. Superior Court*, 24 Cal.3d 890, 157 Cal.Rptr. 693, 598 P.2d 854 (1979). This standard is now codified in the California Civil Code. *See* Cal. Civ. Code § 3294(c)(1). This change has allowed for the award of punitive damages in cases which had previously been considered to involve mere negligence or breach of contract. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981) [product liability]; *Nolin v. National Convenience Stores, Inc.*, 95 Cal.App.3d 279, 157 Cal.Rptr. 32 (1979) [slip-and-fall]; *Commercial Cotton Co., Inc. v. United California Bank*, 163 Cal.App.3d 511, 209 Cal.Rptr. 551 (1985) [breach of bank deposit agreement].

C. Tortious Breach of Contract Has Been Expanded To Commercial Contracts

The most recent development which promises to spur the award of punitive damages even further has been the expansion of tort remedies, and hence punitive damages, to a variety of new situations.

For example, from its initial restriction to insurance cases, the tort of bad faith spread to employment contracts, *Cleary v. American Airlines, Inc.*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980); banking contracts, *Commercial Cotton Co., Inc. v. United California Bank, supra*; and leases, *Schweiso v. Williams*, 150 Cal.App.3d 883, 198 Cal.Rptr. 238 (1984). Last year, the California Supreme Court held that a party to *any* contract who both breaches that contract in bad faith and denies the existence of the contract without probable cause may be liable in tort and, upon a showing of malice, oppression, or fraud, may be required to pay punitive damages. *Seaman's Direct Buying Service, Inc. v. Standard Oil of California*, 36 Cal.3d 752, 206 Cal.Rptr. 354, 686 P.2d 1158 (1984). Subsequent cases have held that the mere breach of a commercial contract which arises in circumstances suggestive of fiduciary relationships, public interest, or adhesion will also give rise to a tort remedy. *Wallis v. Superior Court*, 160 Cal.App.3d 1109, 207 Cal.Rptr. 123 (1984) [breach of contract to pay retirement benefits]; *Commercial Cotton Co., Inc. v. United California Bank, supra* [breach of contract for maintenance of a checking account].

At the trial court level, courts seem increasingly willing to allow the issue of punitive damages to go to the jury even in cases involving disputes between sophisticated business people arising out of purely commercial transactions. *See, e.g., Jewell v. Bank of America*, Sonoma County Superior Court, No. 112-439 ($26.7 million punitive damage award); *Micro/Vest v. Computerland Corp.*, Alameda County Superior Court, No. 545-255-4 ($125 million).[6]

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[6] Computerland's motion for a new trial based, *inter alia*, on the impropriety of the punitive damages award and the excessiveness of that award was denied in its entirety on June 3, 1985. If upheld on appeal, that award will be more than 30 times greater than the next highest award ever upheld by a California appellate court. *See Hasson v. Ford Motor Co.*, 32 Cal.3d 388, 185 Cal.Rptr. 654, 650 P.2d 1171 (1984) ($4,000,000 punitive damages award affirmed).

CONCLUSION

The parties and other *amici* will adequately brief the constitutional issues raised by this case. The sole intent of ACIC and CSAA has been to give more concrete focus to the Court's examination of the punitive damages question by supplying statistics on punitive awards from the jurisdiction in which they are most widespread and extreme. The statistics leave no serious question that punitive damages verdicts against civil defendants in California are the equivalent of excessive fines, imposed inconsistently and without discernible standards. As the traditional impediments to the awards of such damages continue to be eroded, the unbridled discretion of juries to award such damages will have an even greater impact on the business transactions of society.

For these reasons, amici urge the Court to assume jurisdiction of this case and to reverse the judgment of the Alabama Supreme Court.

Respectfully submitted,

ROGERS, JOSEPH, O'DONNELL & QUINN
JOSEPH W. ROGERS, JR.
MARTIN QUINN
SUSAN M. POPIK
Attorneys for Amici Curiae
Association of California Insurance Companies and California State Automobile Association Inter-Insurance Bureau

Appendix

Date	Case Name
1985	Schleicher v. Bishop, San D Court, No. 465-951 .....
1985	Alexander v. Hartley Const County Superior Court, No. 77
1985	Chmielowski v. Narkin, Santa Court, No. 540-875 .....
1985	Richardson v. Tysch, Los Ang Court, No. C318-855 .....
1985	Aronson v. Nance, Yolo Count 49717 .....
1985	Sobonja v. Dyl, Los Angeles C No. C315-712 .....
1985	Shergate v. Lincoln Beach M County Superior Court, No. 35
1985	Merrit v. Dillon, San Mateo C No. 275-281 .....
1985	Berger v. Los Angeles Dodgers Superior Court, No. C390-930
1984	Quessenberry v. Jaoui, Los Ang Court, No. C413-180 .....
1984	Moscan International v. City Fre les County Superior Court Nos. C256-601 .....
1984	Pepper v. Guy F. Atkinson Co Superior Court, No. 278-421...
1984	Geis v. Smith, San Francisco C No. 793-043 .....
1984	Weidmann v. Sadin, San Die Court, No. 503-958 .....
1984	Jewell v. Harris, Los Angeles C No. SCC 05739 .....
1984	Yarber v. City of Inglewood, Superior Court, No. SWC 4925

A.1

	Punitive Damage Award
go County Superior	$40,000
ction Co., Ventura 06	$20,000
lara County Superior	$30,000
les County Superior	$90,000
Superior Court, No.	$2,500
unty Superior Court, ...	$7,500
bile Manor, Orange 7-72	$26,000
unty Superior Court, ...	$75,000
Los Angeles County	$75,000
les County Superior	$10,000
ght Lines, Los Ange- C304-090, C323-276, ...	$7,500
San Mateo County	$46,300
unty Superior Court, ...	$15,000
o County Superior	$2,500
unty Superior Court, ...	$95,000
os Angeles County	$5,500

Date	Case Name	Punitive Damage Award
1984	Crawford Corp. v. Azer, Los Angeles County Superior Court, No. C329-984	$8,025
1984	O'Banion v. Beckford, Napa County Superior Court, No. 45301	$1,005
1984	Caldwell v. State of California, Ventura County Superior Court, No. 74431	$75,000
1984	Wilding v. Otteson, Alameda County Superior Court, No. H-72764-6	$12,500
1984	Gore v. Bache-Halsey, Stuart Shields, Inc., San Francisco County Superior Court, No. 799-141	$2,500
1984	Weaver v. Hurless, Orange County Superior Court, No. 35-33-74	$25,000
1984	Gatturna v. Visintin, Orange County Superior Court, No. 33-30-01	$41,045
1984	Von Leden v. A.E. Harter, Inc., Yolo County Superior Court, No. 45911	$50,000
1984	Mercogliano v. Mututal Benefit Life Ins. Co., San Francisco County Superior Court, No. 784-046	$90,000
1984	Crocker National Bank v. Scott, Contra Costa County Superior Court (No. unknown)	$25,000
1984	Clausen v. Pacific Telephone & Telegraph Co., Santa Clara County Superior Court, No. 442-217	$10,000
1984	Santos v. Anchor Fishing Co., U.S.D.C., San Diego, 82-1302-G(I)	$35,000
1984	Eisenman v. San Diego Navy Federal Credit Union, San Diego County Superior Court, No. 469-832	$25,000
1984	Silva v. County of Los Angeles, Los Angeles County Superior Court, No. C900-933	$8,200
1984	Olson v. Aetna Life & Casualty Co., San Diego County Superior Court, No. 464-040	$30,000
1984	Pearlman v. GTE Directories Corp., U.S.D.C., Los Angeles, CV81-6351-LEW	$50,000
1984	Rosita K. v. National Investment Development Corp., San Francisco County Superior Court, No. 796-365	$40,000
1984	Luna v. Rasmussen, Los Angeles County Superior Court, No. C329-512	$7,500

Date	Case Name	Punitive Damage Award
1984	Hurst v. Scheef, Los Angeles County Superior Court, No. EAC 43381	$75,000
1984	Allen v. Steward Krask & Co., Los Angeles County Superior Court, No. SCC 6073	$90,000
1984	Schiavone v. Matzley, Santa Clara County Superior Court, No. 522-250	$20,000
1984	Jenkins v. Russell, Los Angeles County Superior Court, No. C314-656	$1,000
1984	Badiyan v. Ashurian, Los Angeles County Superior Court, No. C319-152	$25,000
1984	DeAngelis v. County of Los Angeles, Los Angeles County Superior Court, No. EAC 27654	$5,000
1984	Genis v. Schine, Los Angeles County Superior Court, No. C359-776	$78,000
1984	Thompson v. Mercury Ins. Group, Los Angeles County Superior Court, No. C271-758	$6,300
1984	Bresler v. Congress, San Mateo County Superior Court, No. 233-310	$60,000
1984	Quill v. Ryan, Orange County Superior Court, No. 34-47-84	$20,000
1984	Cosgrove v. Anderson, Lake County Superior Court, No. 19188	$4,300
1984	Phipps v. Valley Nat'l Bank, Los Angeles County Superior Court, No. C300-420	$1,000
1984	Piper v. Driver, Alameda County Superior Court, No. 838-862-7	$75,000
1984	Keller v. Placerville Exercise-Spa Center, El Dorado County Superior Court, No. 41863	$10,000
1984	Haber v. Beverly Regency Townhomes, Los Angeles County Superior Court, No. C301-051	$40,000
1984	Duca v. Sentinel Mortgage & Loan Co., Santa Clara County Superior Court, No. 510-037	$9,000
1984	Alves v. Taylor, Fresno County Superior Court, No. 276-364-7	$8,000
1984	Hill v. Sadhu, San Francisco County Superior Court, No. 758-657	$45,000

Date	Case Name	Punitive Damage Award
1984	Savage v. Bank of America, San Francisco County Superior Court, No. 782-170	$9,200
1984	Engell v. M.G. West Co., San Francisco County Superior Court, No. 749-957	$67,000
1984	Kelly v. Taylor, Alameda County Superior Court, No. 564-586-8	$10,000
1984	Green v. Marans, Marin County Superior Court, No. 104-689	$25,000
1984	Zinn v. Zinn, Santa Clara County Superior Court, No. 496-857	$5,000
1984	Bertuch v. Northrop Corp., Los Angeles County Superior Court, No. SWC 62827	$50,000
1983	The Cove, Inc. v. Mora, Los Angeles County Superior Court, No. C293-089	$65,000
1983	Medrano v. City of Los Angeles, Los Angeles County Superior Court, No. C214-517	$2,000
1983	Marshall v. Hansen, Los Angeles County Superior Court, No. C283-677	$1,000
1983	Bonham v. Pyramid Construction Co., Los Angeles County Superior Court, No. C286-500	$15,000
1983	Castaneda v. Michaels, Yolo County Superior Court, No. 47759	$4,000
1983	Lopes v. Morello, Santa Clara County Superior Court, No. 432-961	$1,500
1983	Marks v. Minnesota Mining & Mfg. Co., San Francisco County Superior Court, No. 78976	$75,000
1983	Ball v. Posey, San Francisco County Superior Court, No. 780-206	$40,000
1983	Light v. Witman Ranch, San Diego County Superior Court, No. N18473	$1,000
1983	Doucette v. Yoakum, Napa County Superior Court, No. 43047	$50,000
1983	Dellos v. Reiss, U.S.D.C., Los Angeles, CV80-5820-KN	$70,000
1983	Attard v. Padula, Siskiyou County Superior Court, No. 34821	$2,000

Date	Case Name	Punitive Damage Award
1983	Swartz v. Sequoia Insurance Co., San Mateo County Superior Court, No. 263-477	$48,000
1983	Hill v. Winston, Los Angeles County Superior Court, No. SOC 61369	$50,000
1983	Russell v. Barker Security Services, El Dorado County Superior Court, No. 39240	$2,500
1983	Kendall v. Dashnaw, Santa Clara County Superior Court, No. 488-046	$25,000
1983	Bowen v. McKay, San Luis Obispo County Superior Court (No. unknown)	$22,000
1983	Curran v. Lemos, Alameda County Superior Court, No. 508-921-7	$85,000
1983	Stroup v. Shepard, El Dorado County Superior Court, No. 38802	$5,000
1983	Gallaher v. Bank of America, San Mateo County Superior Court, Nos. 267-843, 270-072	$20,000
1983	Terodec, Ltd. v. Onyx Systems, Inc., Santa Clara County Superior Court, No. 508-434	$60,000
1983	Harmelink v. Breaux, San Francisco County Superior Court, No. 748-154	$28,000
1983	Clark v. Perez, Ventura County Superior Court, No. 74686	$1,500
1983	Marks v. Sears, Roebuck & Co., Contra Costa County Superior Court, No. 197-710	$15,000
1983	Bystrzycki v. Bystrzycki, Los Angeles County Superior Court, No. NCC 122-94G	$15,000
1983	Verdugo v. Galvan, Los Angeles County Superior Court, No. C398-925	$4,000
1983	Turick v. Satori, Los Angeles County Superior Court, No. C214-261	$10,000
1983	Powell v. Southland Colleges, Los Angeles County Superior Court, No. C257-411	$15,000
1983	Greenberg v. Alan Baker Co., San Mateo County Superior Court, No. 253-091	$60,000
1983	Stone v. Nelson, Alameda County Superior Court, No. TR 503-329	$83,000

Date	Case Name	Punitive Damage Award
1983	Seamount v. Maiz, U.S.D.C., Los Angeles, 81-577-FW	$25,000
1983	Linville v. Waller, Santa Clara County Superior Court, No. 471-117	$5,000
1983	Stanton v. Nessim, Los Angeles County Superior Court, No. C225-467	$10,000
1983	Peterson v. Snell, Sacramento County Superior Court, No. 303-110	$25,000
1983	Goodson v. Endy, Los Angeles County Superior Court, No. NWC 64948	$1,000
1983	Robles v. Sandoval, Yolo County Superior Court, No. 43616	$1,000

APPENDIX A.2

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1985	Martin v. Sunrise Memorial Cemetery, Alameda County Superior Court, No. 584-787-7	Cemetery Negligence	$80,000	$100,000	
1985	Manhattan Life Ins. Co. v. Eldridge, Los Angeles County Superior Court, No. C315-712	Insurance Rebate Fraud	$1.00 on cross-complaint	$160,705 on cross-complaint	Motion for new trial by plaintiff/cross-defendant denied.
1985	Winograd v. Mangel, Los Angeles County Superior Court, No. C312-549	Breach of Contract (Employment), Fraud	$27,000	$118,500	
1985	Ruby v. Industrial Indemnity Co., Sacramento County Superior Court, No. 314-482	Wrongful Termination	$225,000	$250,000	

* Aggregate award of damages against all defendants.

† Signifies that motion for new trial was granted by trial judge unless plaintiff agreed to accept remittitur of punitive award to amount stated.

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1985	Gorospe v. Rosselli, Contra Costa County Superior Court, No. 223-231	Real Estate Fraud	$32,707	$100,000	
1985	Smith v. J.C. Penney, Inc., San Joaquin County Superior Court, No. 174-068	Wrongful Termination	$15,000	$276,000	Motion for new trial denied.
1985	Hughes v. Blue Cross of Calif., San Francisco County Superior Court, No. 802-998	Insurance Bad Faith	$150,000	$700,000	
1985	Jacques Interiors v. Edwin Petrak, Los Angeles County Superior Court, No. C319-744	Insurance Bad Faith	$150,000	$700,000	
1984	Kanne v. Connecticut Gen'l Life Ins. Co., U.S.D.C., Los Angeles, No. CV83-2261-ER	Insurance Bad Faith	$250,000	$500,000	
1984	Godfrey v. Westcoast Folk Club, Orange County Superior Court, No. 31-31-29	Assault & Battery, Negligent Supervision of Employee	$35,971	$124,000	Motion for new trial denied, appealed and settled.

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Doe v. Elashi, Los Angeles County Superior Court, No. SWC 67019	Sexual Assault	$325,000	$650,000	
1984	Waite v. Smith, Los Angeles County Superior Court, No. SEC 31493	Defamation	$271,000	$288,750	
1984	Shook v. International Dairy Queen, Sacramento County Superior Court, No. 293-663	Breach of Contract (Franchise Lease), Breach of Fiduciary Duty, Commercial Bad Faith	$184,325	$300,000	Motion for new trial denied
1984	San Jose Cash Register v. Tokyo Electronics Corp., Santa Clara County Superior Court, No. 453-646	Breach of Contract (Distribution), Commercial Bad Faith, Fraud	$468,000	$244,000	
1984	Comfort v. Farasat, Santa Clara County Superior Court, No. 465-171	Breach of Fiduciary Duty	$20,769	$294,700	Settled prior to ruling on motion.
1984	Putz v. Industrial Indemnity Co., Fresno County Superior Court, No. 298-261-9	Insurance Bad Faith	$67,254	$175,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Foreman v. United Ins. Co., Fresno County Superior Court, No. 311-303-2	Insurance Bad Faith	$100,000	$500,000	
1984	Wells v. Raymart Industries, San Francisco County Superior Court, No. 821-071	Asbestos Exposure	$213,000	$200,000	Motion for new trial denied
1984	Smyth v. Herschen, Los Angeles County Superior Court, No. SWC 67929	Fraud	$406,000	$150,000	Motion for new trial denied
1984	Multiplex Ins. Agency v. California Life Ins. Co., Alameda County Superior Court, No. 572-698-5	Breach of General Agency Contract, Bad Faith	$9,377	$100,000	
1984	Ackerman v. K-Mart Discount Stores, Los Angeles County Superior Court, No. NWC 77360	False Arrest	$20,000	$500,000	
1984	Darblay v. Western Medical Enterprises, Sonoma County Superior Court, No. 129-413	Nursing Home Negligence	$46,750	$750,000	Motion for new trial denied

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Barbara Colton Interiors v. Joseoef, San Francisco County Superior Court, No. 799-187	Fraud, Plagiarism, Breach of Contract	$29,221	$292,210	
1984	Kauric v. Hodgson, San Diego County Superior Court, No. 453-818	Personal Injury	$546,050	$200,000	Motion for new trial denied.
1984	Welsh v. Marx, Riverside County Superior Court, No. 32468	Malicious Prosecution	$200,000	$112,000	
1984	Fisher v. 20th Century Ins. Co., Los Angeles County Superior Court, No. C289-277	Insurance Bad Faith	$75,000	$525,000	
1984	Pusateri v. E.F. Hutton, Santa Clara County Superior Court, No. P41234	Stock Brokerage Malpractice	$45,000	$160,000	
1984	Knott v. Boutin, Santa Clara County Superior Court, No. P38938	Fraud	$233,000	$175,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Weaver v. Grodins of Calif., Inc., San Mateo County Superior Court, No. 269-825	Conspiracy	$76,000	$370,000	
1984	Greenup v. Bankers United Life Assurance Co., Los Angeles County Superior Court, No. C295-381	Partnership Dispute	$125,000	$125,000	Motion for new trial denied.
1984	Gigliotti v. Collins, Santa Clara County Superior Court, No. 516466	Malicious Prosecution	$175,572	$175,000	Motion for new trial denied
1984	Nelson v. Arcuri, San Mateo County Superior Court, No. 276-076	Unfair Competition, Interference with Prospective Advantage	$53,000	$114,000	Motion for new trial dismissed by defendant.
1984	Basque French Bakery v. Toscana Baking Co., Fresno County Superior Court, No. 293-772-0	Interference with Prospective Advantage	$35,080	$100,000	Motion for new trial denied
1984	Sanders v. Airport Park Hotel, Los Angeles County Superior Court, No. C268-107	False Arrest, Intentional Infliction of Emotional Distress	$55,000	$125,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Davies v. Parker, Contra Costa County Superior Court, No. 218-536	Breach of Contract (Real Estate), Fraud	$94,160	$100,000	Motion for new trial not made.
1984	Vitali v. Bartell, Orange County Superior Court, No. 353-206	Medial Malpractice	$125,000	$200,000	Motion for new trial denied.
1984	Jones v. Montgomery Ward, Los Angeles County Superior Court, No. 303-841	Racial Discrimination in Employment	$40,000	$400,000	
1984	United Western Ins. Marketing v. Olken, Los Angeles County Superior Court, No. C233-535	Conversion of Company Funds, Wrongful Competition, Libel	$170,281	$166,240	
1984	Allan v. Cal-Farm Ins. Co., Sacramento County Superior Court, No. 293-411	Wrongful Termination	$240,000	$120,000	Motion for new trial denied.
1984	Tassey v. Madera Warehouse Co., Fresno County Superior Court, No. 291-438-0	Breach of Contract (Real Estate), Fraud	$44,139	$100,002	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Greenfield v. Spectrum Investment Corp., Los Angeles County Superior Court, No. NWC 80833	Assault & Battery	$350,000	$442,500	Punitive damages reduced to $380,000 by trial judge.†
1984	Wilson v. Midland Nat'l Life Ins. Co., Los Angeles County Superior Court, No. SEC 04079	Insurance Bad Faith	$155,500	$100,000	Motion for new trial not made.
1984	Willoughby v. Atlas Assurance Co., Santa Clara County Superior Court, No. 423-537	Insurance Bad Faith	$21,800	$150,000	
1984	Abel v. Abel, Riverside County Superior Court, No. JCCP 1670	Drunk Driving	$1,360,000	$100,000	
1984	Coleman & Christianson, Inc. v. Gold Depository & Loan Co., San Francisco County Superior Court, No. 788-025	Breach of Contract (Products, Services)	$38,346	$100,000	Motion for new trial not made.
1984	Oranje v. Bank of America, Solano County Superior Court (No. unknown)	Interference with Prospective Advantage	$56,400	$100,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Hanes v. Davis, Santa Clara County Superior Court, No. 509-526	Contract Dispute	$157,895	$250,000	Motion for new trial denied.
1984	Agarwal v. Bechtel Corp., San Francisco County Superior Court, No. 748-240	Bad Faith in Employment	$75,000	$150,000	
1984	Wright v. Echandi, Stanislaus County Superior Court, No. 191-653	Drunk Driving	$607,000	$100,000	Motion for new trial not made; judgment satisfied.
1984	Coastside Publishers & Printers v. Half Moon Bay Review, San Mateo County Superior Court, No. 267-891	Defamation	$280,000	$400,000	
1984	Boozer v. All-West Design, Fresno County Superior Court, No. 283-964-5	Breach of Contract, Fraud	$71,287	$175,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Baysinger v. Pacific Mutual Life Ins. Co., Sacramento County Superior Court, No. 299-656	Insurance Bad Faith	$9,923	$480,000	Punitive damages reduced to $250,000 by trial judge.†
1983	Sullivan v. Kaiser Foundation Health Plan, San Diego County Superior Court, No. 740-729	Insurance Bad Faith	$45,000	$400,000	Motion for new trial granted as to punitive damages.
1983	Ladd v. Superfilm, Ltd., Los Angeles County Superior Court, No. C288-339	Invasion of Privacy	$300,000	$750,000	
1983	Frankenberger v. Int'l Real Estate Network, Los Angeles County Superior Court, No. C251-804	Breach of Franchise Contract	$392,400	$150,000	
1983	Glass v. Philip Roxane, Inc., Los Angeles County Superior Court, No. C270-762	Product Liability	$500,000	$750,000	Settled prior to ruling on motion for new trial.
1983	Kelly v. General Telephone Co., Los Angeles County Superior Court, No. C333-007	Defamation	$139,000	$139,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Collins v. Berner, Santa Clara County Superior Court, No. P42588	Emotional Distress, Harassment	$164,930	$250,000	Motion for new trial denied; judgment satisfied.
1983	Silverado Title Co. v. Sorensen, El Dorado County Superior Court, No. 32128	Shareholders Dispute, Fraud	$476,000	$150,000	
1983	Dime's Group, Inc. v. Travenol Laboratories, Inc., Santa Clara County Superior Court, No. 497-822	Interference with Contract	$50,000	$225,000	Motion for new trial denied
1983	Greenup v. Rodman & Rodman Aviation Corp., Los Angeles County Superior Court, No. SWC 55678	Breach of Fiduciary Duty	$338,000	$338,000	
1983	Schroeder v. Safeco Ins. Co., Los Angeles County Superior Court, No. C276-816	Insurance Bad Faith	$25,000	$125,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Americana Air Cargo v. Sendrex Cargo, Los Angeles County Superior Court, No. C263-621	Breach of Contract (Business Termination), Emotional Distress	$83,452	$100,000	Motion for new trial not made.
1983	Schwab v. Smith,, Sacramento County Superior Court, No. 287-729	Breach of Contract (Lease-Sale of Real Estate), Fraud	$132,000	$100,000	
1983	Mammoth Vista Owner's Assoc., Inc. v. General Ins. Co., Mono County Superior Court, No. 6283	Insurance Bad Faith	$120,000	$150,000	
1983	Adams v. Esparza, San Francisco County Superior Court, No. 740-553	Drunk Driving Product Liability	$4,037,108	$300,000	Motion for new trial denied
1983	Bravo v. The Clubhouse, Los Angeles County Superior Court, No. SEC 26523	Dramshop Act	$2,000,000	$200,000	
1983	Kan v. American Dist. Telegraph Co., San Francisco County Superior Court, Nos. 766-155, 768-189	Theft by Employee	$60,981	$339,525	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Shirkhani v. Starcrest Productions, Orange County Superior Court, No. 28-82-58	Fraud	$1,400,000	$200,000	Motion for new trial denied.
1983	Four 425 Shatto Bldg. v. Air Conditioning Co., Inc., Los Angeles County Superior Court, No. C259-049	Breach of Contract (Design and Installation), Fraud	$661,369	$500,000	Motion for new trial denied.
1983	Robinson v. Firestone Tire & Rubber Co., Los Angeles County Superior Court, No. C237-373	Product Liability	$80,000	$240,000	Settled.
1983	Wright v. Randles, San Francisco County Superior Court, No. 718-261	Medical Malpractice	$800,000	$200,000	Motion for new trial denied.
1983	Nakahara v. Ace American, Inc., U.S.D.C., Santa Clara (No. unknown)	Securities Fraud	$153,000	$503,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Calloway v. The Travelers Ins. Co., Sacramento County Superior Court, No. 301-780	Insurance Bad Faith	$33,600	$100,000	
1983	Hobbs v. Bateman Eichler, Hill, Richards, Los Angeles County Superior Court, No. C372-866	Breach of Fiduciary Duty	$96,000	$220,000	
1983	Mancini v. Royal Indemnity Co., Alameda County Superior Court, No. 443-154	Insurance Bad Faith	$300,000	$900,000	Motion for new trial not made.
1983	Cook v. Sears, Roebuck & Co., Los Angeles County Superior Court, No. NWC 77359	Defamation	$75,000	$125,000	Motion for new trial denied.

APPENDIX A.3

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1985	Jewell v. Bank of America, Sonoma County Superior Court, No. 112-439	Commercial Bad Faith	$20,000,000	$26,700,000	
1985	Tan Jay Int'l, Ltd. v. Canadian Indemnity Co., Los Angeles County Superior Court, No. C485-516	Insurance Bad Faith	$5,298,178	$35,000,000	
1985	Haun v. NEC Electronics, Inc., Santa Clara County Superior Court, No. 475-898	Breach of Contract (Representation), Fraud	$7,000,000	$46,500,000	Motion for new trial granted.
1985	Micro/Vest v. Computerland Corp., Alameda County Superior Court, No. 545-255-4	Conversion of Dividends	$4,500,000 (approx.)	$125,000,000	Motion for new trial denied.

* Aggregate award of damages against all defendants.

† Signifies that motion for new trial was granted by trial judge unless plaintiff agreed to accept remittitur of punitive award to amount stated.

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1985	Rice Growers Assoc. of California v. Trans-America Delaval, Inc., San Francisco County Superior Court, No. 766-754	Product Liability	$19,163,960	$20,000,000	Punitive damages reduced to $1,000,000 by trial judge.†
1985	McCullough v. S&H Ins. Co., Los Angeles County Superior Court, No. CA000-581	Wrongful Termination	$10,000,000	$10,000,000	
1985	Eastridge v. Shell Oil Co., Orange County Superior Court, No. 39-88-62	Interference with Prospective Advantage	$147,000	$5,002,500	
1985	Young v. Knudsen Corp., Los Angeles County Superior Court, No. C327-913	Breach of Contract (Construction), Fraud	$182,051	$2,120,000	
1985	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, U.S.D.C., San Diego, No. 83-0476-G	Securities Fraud	$25,000	$1,007,500	Punitive damages reduced to $151,200 by trial judge.†
1984	McNair v. Worldwide Church of God, Los Angeles County Superior Court, No. NEC 27381	Defamation	$260,000	$1,000,000	Motion for new trial denied.

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Ballou v. Traweek Investment Co., Los Angeles County Superior Court, Nos. C314-886, C318-757	Real Estate Fraud	$138,000	$2,000,000	Punitive damages reduced to $250,000 by trial judge.†
1984	Tuchinsky v. Tuchinsky, Los Angeles County Superior Court, No. C478-561	Malicious Prosecution	$4,000,000	$2,000,000	Motin for new trial denied.
1984	Farrell v. Police & Fireman Ins. Assoc., Santa Clara County Superior Court, No. 439-453	Insurance Bad Faith	$1,560	$1,150,000	Punitive damages reduced to $161,038.58 by trial judge.†
1984	Litwak v. Fed Mart Corp., San Diego County Superior Court, No. 467-675	Wrongful Termination, Libel	$3,270,791	$3,000,000	Motion for new trial denied
1984	Dustman v. AMC Jeep Corp., Shasta County Superior Court (No. unknown)	Product Liability	$113,100	$4,300,000	Motion for new trial denied.

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Taylor v. State Farm, Los Angeles County Superior Court, No. C300-645	Insurance Bad Faith	$576,000	$2,000,000	
1984	Haughton v. Unigard Mutual Ins. Co., Los Angeles County Superior Court, No. C165-151	Insurance Bad Faith	$1,170,433	$4,000,000	Motion for new trial denied.
1984	Davis v. Continental Ins. Co., Santa Clara County Superior Court, No. 527-880	Insurance Bad Faith	$91,350	$1,500,000	Motion for new trial denied.
1984	Satalich v. State Farm, Orange County Superior Court, No. 31-76-01	Insurance Bad Faith	$0	$1,007,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Mattie v. Picker Corp., Santa Clara County Superior Court, No. 444-398	X-Ray Exposure	$260,000	$3,500,000	Motion for new trial denied.
1984	Royster v. Mission Ins. Co., Santa Clara County Superior Court, No. 491-170	Insurance Bad Faith	$206,094	$4,000,000	
1984	Bertolani v. Equitable Life Assurance Society, Sacramento County Superior Court, No. 304-814	Insurance Bad Faith	$500,000	$5,000,000	Motion for new trial denied.
1984	Downey Savings & Loan Assoc. v. Ohio Casualty Ins. Co., Los Angeles County Superior Court, No. C262-871	Insurance Bad Faith	$123,769	$5,000,000	
1984	Fellows v. Allstate Ins. Co., Los Angeles County Superior Court, No. C259-993	Insurance Bad Faith	$500,000	$40,025,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1984	Greenberg v. Coldwell Banker Co., Los Angeles County Superior Court, No. C262-113	Real Estate Fraud	$826,500	$8,456,250	
1984	Gump v. Wells Fargo Bank, San Francisco County Superior Court, No. 740-289	Breach of Trust	$23,262	$1,000,000	
1984	Pitts v. Fibre-board Corp., Alameda County Superior Court, No. 509-336-0	Asbestos Exposure	$869,810	$1,800,000	Motion for new trial denied
1984	Phillips v. Travelers Financial Services, Sacramento County Superior Court, No. 313-139	Wrongful Termination	$2,215,583	$1,584,000	
1984	Stern v. Dow Corning, Corp., U.S.D.C., San Francisco, No. C83-2348	Product Liability	$211,000	$1,500,000	
1983	Lembo v. Nardoni, Los Angeles County Superior Court, No. C394-771	Fraud	$755,000	$1,000,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Creative Wood Design v. Aetna Casualty & Surety Ins. Co., Santa Cruz County Superior Court, No. 72066	Insurance Bad Faith	$400,000	$1,000,000	
1983	The P.K.L. Companies v. Eaton Corp., Los Angeles County Superior Court (No. unknown)	Breach of Fiduciary Duty, Accounting Fraud	$2,633,599	$15,000,000	Motion for new trial denied.
1983	Berk v. National Union Fire Ins. Co., Los Angeles County Superior Court, No. C248-876	Insurance Bad Faith	$659,231	$13,054,479	Motion for new trial denied.
1983	Young v. Great Western United, Inc., Los Angeles County Superior Court, No. C140-284	Breach of Employment Contract, Fraud	$278,250	$1,500,000	Motion for new trial denied.
1983	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp., Ltd., Los Angeles County Superior Court, No. C293-403	Fraud	$500,000	$2,035,000	

Date	Case Name	Type of Case	Compensatory Damages*	Original Punitive Damages*	Disposition of Punitive Award Following Motion For New Trial (If Known)†
1983	Frazier v. Metropolitan Life Ins. Co., Los Angeles County Superior Court, No. C233-971	Insurance Bad Faith	$162,000	$8,000,000	Punitive damages reduced to $2,000,000 by trial judge;† stricken on appeal based on statute of limitations.
1983	Shepler v. Anami Ashram, Inc., Santa Clara County Superior Court, Nos. P41427, P41647	Will Contest (Undue Influence)	$18,000	$2,000,000	
1983	Sprague v. Equifax, Inc., Los Angeles County Superior Court, No. C218-000	Conspiracy to Deny Insurance Benefits	$100,000	$5,000,000	Punitive damages reduced to $1,000,000 by trial judge;† affirmed on appeal.
1983	Boles v. Travelers Indemnity Co., San Francisco County Superior Court, No. 763-319	Insurance Bad Faith	$637,000	$2,000,000	Motion for new trial denied.
1983	West v. Johnson & Johnson Products, Inc., Santa Clara County Superior Court, No. 465-188	Product Liability	$500,000	$10,000,000	

Appendix A.4

STATISTICAL ANALYSIS SUMMARY

I

Average Punitive Damage Verdict:

All verdicts:	
1983	$ 951,596
1984	943,589
1985 (approx.)(1)	10,542,354
Top 15 verdicts:	
1983	$ 4,232,832
1984	5,877,683
1985	18,235,680(2)

II

Largest awards as a percentage of all punitive awards:

Awards of $1,000,000 or more:	
1983	15%
1984	18%
1985	35%
Awards of $10,000,000 or more:	
1983	4%
1984	0.9%
1985	23%

---

(1) The 26 cases from 1985 are those reported in *Jury Verdicts Weekly* through the July 5, 1985 edition, which includes cases for about the first quarter, and five recent verdicts reported in newspapers but not yet in *Jury Verdicts Weekly*.

(2) Eliminating the highest award ($125,000,000), this figure becomes $10,609,657 for the next 14 highest verdicts.

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (re Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Finney v. *Lockhart* (1950) 35 Cal.2d 161	$1	$2,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	2,000 to 1
Bertero v. *National General Corp.* (1974) 13 Cal.3d 43	$553,953	$625,000	No wealth data	Denied	No wealth data	Affirmed	No wealth data	1.1 to 1
Neal v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910	No more than $10,000	About $1,538,211	0.73% net assets 0.2% gross assets 12.5 days net income	Granted (unless Punitives remitted to $740,000)	0.35% net assets 0.1% gross assets 6 days net income	Affirmed	0.35% net assets 0.1 gross assets 6 days net income	74 to 1
Wetherbee v. *United Ins. Co. of America* (1968) 265 Cal.App.2d 921	$1,050	$500,000	No wealth data	Denied	No wealth data	Punitive Damages Reversed as Excessive	No wealth data	476.2 to 1
Wetherbee v. *United Ins. Co. of America* (1971) 18 Cal.App.3d 266	$1,050	$200,000	0.33% net assets 0.07% gross assets 6.1 days net income	Denied	0.33% net assets 0.07% gross assets 6.1 days net income	Affirmed	0.33% net assets 0.07% gross assets 6.1 days net income	190.5 to 1

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (re Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Roemer v. *Retail Credit Co.* (1975) 44 Cal.App.3d 926	$40,000	$250,000	0.63% net worth 2.78% net income 10 days net income	Denied	0.63% net worth 2.78% net income 10 days net income	Affirmed	0.63% net worth 2.78% net income 10 days net income	6.3 to 1
Merlo v. *Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5	$267,295	$500,000	31.1% net worth	Denied	31.1% net worth	Both Compensatory and Punitive Damages Reversed as Excessive	—	—
Zhadan v. *Downtown L.A. Motors* (1976) 66 Cal.App.3d 481	$5,342	$175,000	32.92% net worth	Granted (unless Punitives remitted to $50,000)	9.4% net worth	Punitive Damages Reversed as Excessive	—	—
Little v. *Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451	$172,325	$2.5 million	14.83% net assets In excess of 15% net worth	Denied	14.83% net assets In excess of 15% net worth	Punitive Damages Reversed as Excessive (unless remitted to $250,000)	1.48% net assets In excess of 1.5% net worth	1.5 to 1

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (re Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Walker v. *Signal Companies, Inc.* (1978) 84 Cal.App.3d 982	$17,328	$215,000	Less than 1% gross assets	None	Less than 1% gross assets	Compensatory Damages Reduced to $8,814 Punitive Damages Affirmed	Less than 1% gross assets	25.6 to 1
Zhadan v. *Downtown Los Angeles Motor Distributors, Inc.* (1979) 100 Cal.App.3d 821	$5,260	$90,000	6.85% net worth	Denied	6.85% net worth	Affirmed	6.85% net worth	17.1 to 1
Miller v. *Elite Ins. Co.* (1980) 100 Cal.App.3d 739	Apparently $15,000	$150,000	2-3% net worth (or maybe 18%)	None	2-3% net worth (or maybe 18%)	Affirmed	2-3% net worth (or maybe 18%)	10 to 1
Schomer v. *Smidt* (1980) 113 Cal.App.3d 828	$20,000	$16,000	10% net worth About 3 months salary	Denied	10% net worth About 3 months salary	Affirmed	10% net worth About 3 months salary	0.8 to 1
Godfrey v. *Steinpress* (1982) 128 Cal.App.3d 154	$21,800	$60,000	6% net assets 4.62% net worth	None	6% net assets 4.62% net worth	Affirmed	6% net assets 4.62 net worth	2.8 to 1

Case	Compensatory Damages	Original Punitive Damages	Relationship of Punitive Damages to Wealth of Defendant	Trial Court Ruling on New Trial Motion	Relationship of Punitive Damages to Wealth of Defendant	Appellate Court Decision (re Damages)	Final Relationship of Punitive Damages to Wealth of Defendant	Final Ratio of Punitive Damages to Compensatory Damages
Burnett v. *National Enquirer, Inc.* (1983) 144 Cal.App.3d 991	$300,000	$1.3 million	50% net worth 83.33% net income 10 months net income	Damages Remitted to $50,000 Compensatory $750,000 Punitives	28.85% net worth 48.08% net income 5.8 months net income	Punitive Damages Reversed as Excessive (unless remitted to $150,000)	5.77% net worth 9.62% net income 5 weeks net income	3 to 1
Moore v. *American United Life Ins. Co.* (1984) 150 Cal.App.3d 610	$30,000	$2.5 million	3.2% net assets 0.25% gross assets 3.4 weeks net income	Denied	3.2% net assets 0.25% gross assets 3.4 weeks net income	Affirmed (Reversed award of attorney fees)	3.2% net assets 0.25% gross assets 3.4 weeks net income	83.33 to 1

No. 84-1601

Supreme Court, U.S.
FILED
AUG 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE COMPANY,
Plaintiff,

versus

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Defendants

Motion of Alabama Defense Lawyers' Association for Leave to File Amicus Brief

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Davis Carr
Alabama Defense Lawyers' Association
c/o Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

Counsel of Record

BEST AVAILABLE COPY

No. 84-1601

IN THE SUPREME COURT OF THE UNITED STATES

AETNA LIFE INSURANCE COMPANY,
Plaintiff,

versus

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Defendants.

MOTION OF ALABAMA DEFENSE LAWYERS' ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF

Comes now the Alabama Defense Lawyers' Association and files this Motion for Leave to file an Amicus Brief in this cause. This association has an interest in the administration of justice for the citizens and businesses in the State of Alabama. Movant represents that, given the page limitations, appellant will not be adequately able to fully address all legal issues concerning whether Alabama Supreme Court Justice T. Eric Embry should have recused himself, and further, how that action impacted the entire court. More importantly, this association's participation in the briefing process will underscore that the issues presented for this Court go beyond a resolution in the case at bar, to address the due process of all litigants before the Alabama Supreme Court. That is, this association's participation is intended to demonstrate that the concern for fairness goes beyond the insurance company involved in this litigation, and the proceedings below need to be examined in light of these due process and fairness issues as they concern the administration of justice in the State of Alabama.

Consent has not been obtained from all parties to this case.

Davis Carr pcc

DAVIS CARR
For Alabama Defense Lawyers' Association
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 25 day of August, 1985, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States Mail, properly addressed and first class postage prepaid.

Davis Carr pcc

DAVIS CARR

Honorable Joseph M. Brown, Jr.
Attorney at Law
Post Office Box 66705
Mobile, Alabama 36660

Honorable Charles A. Graddick
Attorney General
250 Administrative Building
Montogomery, Alabama 36130

Honorable Edgar M. Elliott, III
Attorney at Law
1700 Financial Center
Birmingham, Alabama 35203

Honorable James T. Upchurch
Attorney at Law
Post Office Box 270
Montgomery, Alabama 36195

Honorable Lanny Vines
Attorney at Law
1800 City Federal Building
Birmingham, Alabama 35203

Honorable Harry Cole
Attorney at Law
Post Office Box 116
Montgomery, Alabama 36195

Honorable Thad Salmon
Attorney at Law
2108 East South Boulevard
Montgomery, Alabama 36111

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No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

AETNA LIFE INSURANCE COMPANY,

Appellant,

vs.

MARGARET W. LAVOIE,
and ROBERT L. LAVOIE, SR.,

Appellees.

ON APPEAL FROM
THE SUPREME COURT OF ALABAMA

THE BRIEF OF THE ASSOCIATION OF CALIFORNIA TRIAL LAWYERS AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLEE

HARVEY R. LEVINE, ESQ.
Counsel of Record
JANET LEWIS, ESQ.
1200 Third Avenue, Suite 1400
San Diego, California 92101
(619) 231-9449
Attorneys for Amicus Curiae
The California Trial
Lawyers Association

PETER PERLMAN
President
THE ASSOCIATION OF TRIAL
LAWYERS OF AMERICA
388 South Broadway
Lexington, Kentucky 40508
(606) 253-3919
Attorney for Amicus Curiae
The Association of Trial
Lawyers of America

(additional counsel for *Amicus Curiae* The California Trial Lawyers Association listed inside cover)

Lawyer's Brief Service, Inc. / Legal Publishers / (213) 383-4457

ARNE WERCHICK
501 Humboldt Avenue
Sausalito, California 94965

WYLIE A. AITKEN, ESQ.
600 West Santa Ana Boulevard
Santa Ana, California 92701

VICTORIA DeGOFF, ESQ.
1916 Los Angeles Avenue
Berkeley, California 94707

DOUGLAS deVRIES, ESQ.
721 Ninth Street, Suite 300
Sacramento, California 95814

JOHN GARDENAL, ESQ.
1255 Post Street, Suite 800
San Francisco, California 94109

IAN HERZOG, ESQ.
10880 Wilshire Boulevard, Suite 1900
Los Angeles, California 90024

ROBERT STEINBERG, ESQ.
888 West 6th Street, 2nd Floor
Los Angeles, California 90017

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No. 84-1601

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

AETNA LIFE INSURANCE COMPANY,

Appellant,

vs.

MARGARET W. LAVOIE,
and ROBERT L. LAVOIE, SR.,

Appellees.

THE BRIEF OF THE ASSOCIATION OF CALIFORNIA TRIAL LAWYERS AND THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

With the consent of the parties, the California Trial Lawyers Association and the Association of Trial Lawyers of America respectfully submit this brief as *amici* curiae in support of appellees. The copies of the letters of both parties confirming this consent have been filed with this court.

The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization comprised of approximately 5,000 trial lawyers. The Association of Trial Lawyers of America ("ATLA"), founded thirty-eight years ago, is a voluntary national association of over 55,000 trial attorneys whose members regularly appear in both state and federal court. The predominant practice of most CTLA members is in the representation of injured tort victims and victims of consumer fraud. ATLA members primarily represent injured tort victims, people who have been discriminated against, and people accused of crimes.

Both Associations, through their appropriate officers and committees, have authorized the participation in this case as *amici curiae*.

Amici are concerned that the position taken by appellants and *amici* counsel, in support of appellants, is simply another attempt to shelter tortfeasors by taking away one of the strongest deterrents to tortious conduct, punitive damages. The attempt at withdrawal of this remedy shows once again that the insurance industry is more concerned with the profitability of the tortfeasor than the wrongful and tortious misconduct exhibited by these entities. Wrongful civil conduct should not go unchecked within the context of civil litigation.

We believe that a reversal of the decision of the Supreme Court of Alabama would harm large segments of our society and would violate fundamental principles of the Anglo-American legal system.

SUMMARY OF ARGUMENT

In this brief, *amici* will demonstrate that the relationship of punitive damages in civil litigation is not the conceptual

equivalent of "punishment" in the context of criminal law. Therefore, because punitive damages are civil and not criminal in nature, the Excessive Fines Clause of the Eighth Amendment is inapplicable to these proceedings. Furthermore, existing procedures available to defendants in civil litigation affords sufficient due process safeguards. Limiting and restricting civil punitive damage awards will only serve to encourage intentional and calculated misconduct. Such intentional and profitable civil misconduct should not be protected or condoned.

INTRODUCTION

Appellants and *amici*, in support of appellants, do not address the issue of the need for punitive damages in the civil context nor the therapeutic value in the application of punitive damages. The necessity and justification for punitive damage awards are readily apparent when the facts of such cases are explored. Instead of resolving the circumstances and problems that lead to these punitive verdicts, appellant/*amici* dwell on the fact that more defendants are getting caught today than fifteen years ago. Worse yet is the complaint regarding how expensive it is once the conduct is exposed.

California courts have awarded punitive damages based on conduct which no reasonable person would consider acceptable: *Fletcher v. Western National Life Insurance Company*, 10 Cal.App.3d 376 (1970) [Disability insurance benefits terminated on false pretext — defendants concede their conduct was "deplorable" and "outrageous."]; *Wetherbee v. United Insurance Company of America*, 265 Cal.App.2d 921 (1968) [Disability insurance benefits wrongfully terminated on basis that although totally disabled, the insured was not continuously house confined.];

qualification is expected other than involving financial interest: when a judge (1) has a prior relationship with some person either a party to or representing a party to the case; (2) has personal knowledge of the case before him; or (3) has a personal bias or prejudice against some person a party to the case. This result has been reached by both judicial decision and statute. *See, e.g., Petrey v. Holliday,* 199 S.W. 67 (Ky. 1917) (relationship); CAL. CIV. PROC. CODE § 170 (1) (West Supp. 1981) (personal knowledge of case); and *Berger v. United States,* 255 U.S. 22 (1921) (bias towards class of people).

The common law rule that only direct pecuniary interest in the case was grounds for disqualification has also been expanded in American practice. When a judge owns corporate stock in a case wherein the corporation is interested, he is disqualified from presiding over the case. *Gaer v. Bank of Baker,* 107 P.2d 877 (Mont. 1941); *State v. Chillingworth,* 116 So. 633 (Fla. 1928).

When the judge has an interest other than direct ownership or pecuniary gain the issue becomes the remoteness of the interest. While grounds for disqualification at common law, courts are split on whether a judge may sit in a case where his ruling will affect tax or utility rates in his home comunity. *See Peters v. Meeks,* 171 So. 2d 562 (Fla. Dist. Ct. App. 1964); *Pradwzik v. Grand Rapids,* 21 N.W.2d (Mich. 1946); *City of Grafton v. Holt,* 52 S.E. 21 (W. Va. 1905).

Nonetheless, a basic American principle is that the interest which constitutes grounds for disqualification must be direct and capable of demonstration, rather than remote, theoretical, speculative, or contingent. *Evans v.*

Gore, 253 U.S. 245 (1920); *City of Bangor v. American Federation of State, County, and Mun. Employees,* 449 A. 2d 1129 (ME. 1982); *Kostal v. People,* 414 P.2d 123 (Colo. 1966), *cert. denied,* 385 U.S. 939; *State ex rel. Anaya v. Scarborough,* 410 P.2d 232 (N.M. 1966); *Ferguson v. Brown,* 21 So. 603 (Miss. 1897); *Trustees of Internal Revenue Fund v. Bailey,* 10 Fla. 213 (1818).

Bias, or impartiality, is the most often invoked and difficult to prove ground of disqualification. In the proper circumstances, it is grounds requiring the recusal of a judge. Essentially, bias encompasses all the familiar grounds for disqualification as they can be seen as reasons why a judge would not be impartial. An established principle is that the bias or prejudice that will disqualify a judge must be personal as distinguished from judicial. *U.S. v. Grinnell Corp.,* 384 U.S. 563 (1966); *Lyons v. U.S.,* 325 F.2d 370 (9th Cir. 1964), *cert denied,* 377 U.S. 969; *Tynan v. U.S.,* 376 F.2d 761 (D.C. Cir. 1967), *cert denied,* 389 U.S. 845; *Eisler v. U.S.,* 170 F.2d 273 (D.C. Cir. 1948); *Brooks v. U.S.,* 458 A.2d 66 (D.C. App. 1983); *Stone v. Dept. of Pensions and Securities,* 421 So.2d 129 (Ala. Civ. App. 1982); *State v. Buckley,* 244 A.2d 254 (R.I. 1968); *Walker v. People,* 248 P.2d 287 (Colo. 1952). Also, the cases are clear that personal bias or prejudice against one party or in favor of another does not arise solely on the basis of a biased state of mind against a wrongdoer acquired from evidence presented at trial, or from the possession of definite views on the law, or an impersonal prejudice which goes to the judges background or experience rather than an apprai[illegible]sel of the defendant personally. *Laird v. Tatum,* 409 U.S. 824 (1972); *Scott v. Beams,* 122 F.2d 777 (C.C.A. 10th, 1941); *U.S. v. Gilboy,* 162 F. Supp.

384 (M.D. Penn. 1958); *U.S. v. Ramos*, 291 F. Supp. 71 (D.R.I. 1968); *People v. Yeager*, 359 P.2d 261 (Cal. 1961).

In *Johnson v. Salem Corporation*, 458 A.2d 1290 (N.J. Super. Ct. App. Div. 1983), defendants in a products liability action sought to have the trial judge disqualified on the basis that the judge had some 30 years prior injured his fingers in a machine shop. The court held that a judge is not ordinarily disqualifiable because of his own life experiences; and that because a judge may have previously sustained personal injury in a machine shop was not grounds for disqualifying the judge in a products liability action arising out of an industrial accident. Said the court:

> Obviously a judge is not disqualified from presiding at an automobile accident trial merely because he was once himself in an automobile accident. Nor is a judge disqualified from trying a divorce case either because he is himself married or divorced, or from trying a contested adoption case because he has either natural children or adopted children.

Johnson, 458 A.2d 1290, 1295.

The overall emerging principle on disqualification of judges in both federal and state courts, as based on the foregoing rules, is that a justice or judge should recuse himself in any proceeding in which his impartiality might *reasonably* be questioned. This principle is embodied in 3(C) of the Canons of Judicial Ethics which guide the federal system, as codified in 28 U.S.C. § 455, and the majority of states, including Alabama, which have also codified the Cannons to guide their courts.

C. Disqualification Practice In Alabama

Prior to the adoption of the Canons of Judicial Ethics, Alabama's disqualification practice was similar to that of

other jurisdictions. Causes for disqualification of a judge were those affecting (1) his individual rights, (2) pecuniary interest, (3) relation to a party, and (4) any interest the probable and natural tendency of which would create bias in the mind of the judge for or against a party to the suit. *Woodmen of the World v. Alford*, 206 Ala. 18, 89 So. 528 (1920). Holding that a judge related within the fourth degree of affinity or consanguinity to the slain was disqualified to try the one charged with the murder, the Supreme Court noted that the stern morality of the common law required a judge to be *legally* indifferent between the parties. *Gill v. State*, 61 Ala. 169 (1878).

Alabama courts also recognize that the interest which disqualifies a judge must be direct and immediate, rather than remote and contingent. *Woodmen of the World v. Alford*, 206 Ala. 18, 89 So. 528 (1920). Such a remote, speculative interest as is averred by petitioners is not the type interest which either the common law or Canon 3(C) of the Canons of Judicial Ethics contemplates. As the Alabama Supreme Court explained in *Ex Parte State Bar Association*, 92 Ala. 113, 8 So. 768 (1890):

> The interest which will disqualify must be a pecuniary one, or one affecting the individual rights of the judge. . . . [T]he liability or pecuniary gain or relief to the judge must occur upon the event of the suit, not result remotely, in the future, from the general operation of law upon the *status* fixed by the decision.

92 Ala. at 118 [Emphasis by the court].

Applying Canon 3(C) (1) of the Alabama Canons of Judicial Ethics in *Acromag-Viking v. Blalock*, 420 So.2d 60 (Ala. 1982), the court ruled that a trial judge who was

on the board of directors of a corporation which employed the defendant, should have recused himself from the case. The court, noting that recusal is not required by a mere accusation of bias unsupported by substantial fact, recognized that substantial facts existed to question the trial judge's impartiality. *See also Hartman v. Board of Trustees of the University of Alabama,* 436 So.2d 837 (Ala. 1983), where the court, in line with both state and federal practice, noted that bias and prejudice may not be presumed or inferred by a judge's subjective views. *Id.* at 841. Cf. *In Re Sheffield,* 465 So.2d 350 (Ala. 1984); *Wallace v. Wallace,* 352 So.2d 1376 (Ala. Civ. App. 1977).

In accordance with the Alabama Canons of Judicial Conduct, justices of the Alabama Supreme Court have readily recused themselves whenever required by law or when their impartiality might *reasonably* be questioned. In 1967 the entire Court recused itself when a fellow justice's personal injury suit reached the Court on appeal. *Ex Parte Alabama Power Co.,* 280 Ala. 586, 196 So.2d 702 (1967). The entire Court also recused itself in *Duncan v. Johnson,* 338 So.2d 1243 (Ala. 1976), because of the apparent involvement of one of their members in the questioned controversy.

Mr. Justice Embry, following the letter and spirit of the Canons of Judicial Ethics, has readily recused himself, whether asked to or not, in any cases in which any *reasonable* argument could be made that he had an interest in the outcome or would be prejudiced against one party or another. *See, e.g., Blue Cross and Blue Shield of Alabama v. Granger,* 461 So.2d 1320 (Ala. 1984); *Ex Parte Roach,* 414 So.2d 80 (Ala. 1982); *Churchill v. Board of Trustees,* 409 So.2d 1382 (Ala. 1982); *Roach v. Bynum,*

403 So.2d 187 (Ala. 1981); *Herston v. Whitesill*, 348 So.2d 1054 (Ala. 1977); *Ex Parte Bynum*, 348 So.2d 828 (Ala. 1977); *Lowery v. State*, 317 So.2d 360 (Ala. 1975).

Such was the case when Mr. Justice Embry recused himself from consideration of the case of *Blue Cross/Blue Shield of Alabama v. Granger*, 19 ABR 444 (Dec. 21, 1984). That case, of course, involved the same defendant which Mr. Justice Embry is presently maintaining an action against and involved consideration of the business practices of that company which also would be involved in his pending action.

The same considerations which led to Mr. Justice Embry's recusal in the *Granger* case are clearly absent from the present cases. There is no action pending on behalf of Mr. Justice Embry against either Aetna or Nationwide. The business practices of Blue Cross/Blue Shield, who he does have an action against, are not being scrutinized in the present case. Nor are the business practices of Nationwide or Aetna considered in these cases like those of Blue Cross and Blue Shield put at issue by Mr. Justice Embry's complaint in *T. Eric Embry, etc. v. Blue Cross/Blue Shield of Alabama.*

The factual dissimilarities between Mr. Justice Embry's case and the present cases are especially significant when you consider that the Alabama Supreme Court has consistently held, including the present appeal filed by Aetna, that:

> Whether an insurance company is justified in denying a claim under a policy must be judged by what is before it at the time the decision is made.

National Savings Life Insurance Co. v. Dutton, 419 So.2d 1357, 1362 (Ala. 1982); *Federated Guaranty Life Ins. Co. v.*

Wilkins, 435 So.2d 10, 13 (Ala. 1983). It follows that the success of or the failure of Mr. Justice Embry's case will turn upon the facts proved in that case, not the facts proved against Aetna and Nationwide in the present cases.

Regardless of the outcome of the present cases, Mr. Justice Embry will not be relieved of his burden of proof in his case against Blue Cross/Blue Shield. He will still have to meet the burden of proof and, on the facts of that case, convince twelve jurors that he is entitled to recover.

In addition to what has been said above, it is worth noting that Mr. Justice Embry does not have any financial interest whatsoever in these cases. Regardless of whether these cases are affirmed or reversed, Mr. Justice Embry will not receive any benefit by way of the awards in these cases, either directly or indirectly.

D. The Determination of the Qualification To Sit.

> Each justice must determine for himself both the legal sufficiency of a request seeking his disqualification and the propriety of withdrawing in any particular circumstances.[4]

The commentary to section 3.42 of the American Bar Association Standards Relating to Appellate Courts explains why the question of recusal of an appellate judge is best decided by the judge himself:

> "An appellate judge should be subject to challenge for cause on the same grounds as a trial judge, and also when an appeal involves a review of his own decision. The most difficult problem concerns the procedure to be employed. As in the challenge of a

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[4] *In re Estate of Carlton*, 378 So. 2d 1212, 1216 (Fla. 1979), *cert. denied Hayes v. Rogers*, 447 U.S. 922 (1980).

> trial judge, if the challenge is sufficient on its face and any reasonable doubt of the judge's disinterestedness is suggested, the judge may be expected to disqualify himself. If he does not do so, in the case of a trial judge factual issues relating to disqualification should be properly determined by another judge . . . In the case of an appellate judge, however, that procedure would subject the judge to decision of his disinterestedness by official peers with whom he may continue to serve in a collegial capacity in deciding the case. Moreover, because an appellate court decides questions of law rather than fact, the question of an appellate judge's 'bias' is often practically indistinguishable from the question of his views on the law, which are not properly subject to disputation through the recusal procedure. Given these complications, it is better that the question of recusal be decided by the judge himself. . . . In the collegial decision-making of an appellate court an individual judge's purely personal views are of less significance than they would be in a trial court and he is subject to collegial restraint should he be inclined to act on them; an appellate judge has few occasions for exercising the broad discretion reposing in a trial judge; and in appellate litigation there is no occasion for the intense personal interaction between the judge and the lawyers and litigants that may occur in a trial court. Moreover, an appellate judge's established views on law and justice, at least up to a point, are a proper element of the contribution he makes to the function of an appellate court, particularly in the development of the law. A peremptory challenge might easily be abused to exclude a judge solely because a litigant disagreed with his views.

The procedures utilized by the Alabama Supreme Court in ruling on motions to disqualify comport with the modern approach to disqualification and the requirements of due process of law. When presented with the motions to disqualify in these cases the court referred the question

of recusal, discretionary in each instance, to each of its individual members. This procedure is in accord with the great weight of authority, as well as the American Bar Association Standards Relating to Appellate Courts. *See, e.g., Laird v. Tatum,* 409 U.S. 824 (1972); *Berger v. United States,* 255 U.S. 22 (1921); *Shadid v. Oklahoma City,* 494 F.2d 1267 (10th Cir. 1974); *Grimes v. United States,* 396 F.2d 331 (9th Cir. 1968); *Hawaii-Pacific Venture Capital Corp. v. Rothbard,* 437 F. Supp. 230 (D. Hawaii), appeal dismissed, 564 F.2d 1343 (9th Cir. 1977).

E. Recusal Only Required Where Reasonable Basis For Questioning Impartiality Exists.

Most judges honor high ethical standards in the profession and believe in fair trials for all litigants; they will voluntarily recuse themselves in any situation where their conduct or impartiality can be seriously questioned.

The standard for recusal sought to be established by petitioners misapplys long-standing rules and principles, both common law and statutory, and is manifestly unreasonable. Requiring recusal where a justice's personal life and experiences are so remotely associated with a case on appeal would cause the cost and delay of justice to go out of bounds. It would improperly subject to disputation through the recusal procedure a judge's views on the law. Justices would be required to live in a vacuum in order to sit on the cases heard and decided.

A justice who has a pending suit involving an automobile accident and maintained on a negligence theory could not sit on any case involving the negligence or alleged negligence of the operators of a motor vehicle. Would it also mean that the justice could never again sit on such

a case, even after his suit has been brought to a conclusion? What about all negligence cases? This hypothetical situation would apply to every other civil action imaginable. Notwithstanding the foregoing dilemma, there would always exist some minute ground for disqualification—the justice is a former plaintiff or defense attorney, a corporate or civil rights attorney, and he is therefore biased in favor of the class of litigants he once represented, or his views are too liberal or conservative. Such a standard of recusal would lead to judge shopping, increase the cost and delay of litigation and thereby thwart justice.

The standard for disqualification applied in Alabama is virtually identical to federal and state practice and affords litigants every consideration which our system of justice has to offer. That standard, guided by the rules and policies embodied in Canon 3(C) of the Canons of Judicial Ethics, as well as common law, is ultimately a standard of reasonableness. A reasonable person of ordinary prudence in the position of a State Supreme Court justice, with knowledge of all the facts known to the justice could not find that there exists a reasonable basis for questioning a justice's impartiality when that justice has no interest, pecuniary or otherwise, directly or indirectly, in the outcome of the litigation and harbors no personal bias or prejudice for or against any of the parties. The remote, speculative interest which is alleged in this case is not a financial interest in the subject matter in controversy, nor is it the type of other interest that could be substantially affected by the outcome of the proceeding as contemplated by Canon 3(C) (1).

Policy considerations of the ramifications of the adoption of such a recusal standard as well as an analysis of

the applicable statutory and case law point directly toward an affirmance of the proceedings below.

CONCLUSION

For the reasons advanced above, the judgment of the Alabama Supreme Court is due to be affirmed.

Respectfully submitted,

/s/ LANNY S. VINES
Past President Alabama Trial Lawyers Association
/s/ LLOYD W. GATHINGS, II*
Executive Committee
Alabama Trial Lawyers Association

*Counsel of Record

Amicus for Respondent
1800 City Federal Building
Birmingham, Alabama 35203

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~~MOTION OF~~ ALABAMA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF IN OPPOSITION TO APPELLANT AETNA LIFE INSURANCE CO.

LANNY S. VINES
*LLOYD W. GATHINGS, II
Alabama Trial Lawyers
Association
1800 City Federal Building
Birmingham, Alabama 35203
(205) 254-3224

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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—o—

MOTION OF ALABAMA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF

—o—

Comes now the Alabama Trial Lawyers Association and files this Motion for Leave to file an Amicus Brief in this cause. The members of the Alabama Trial Lawyers Association represent numerous citizens of the State of Alabama who have been injured or damaged by the wrongful conduct of others. In many instances the continuation of the citizens' basic enjoyment of life depends wholly upon due process being afforded them by the Alabama courts.

The precedent which the appellant seeks to establish regarding recusal has serious consequences to our judicial

system and the due process rights of the citizens of Alabama. These issues deserve to be addressed fully by all interested parties. It is the desire of the Alabama Trial Lawyers Association to provide assistance to the Court on the recusal issues raised by the appellant.

Consent has been obtained from appellees and appellant in this case.

LANNY S. VINES

LLOYD W. GATHINGS, II
For Alabama Trial Lawyers
Association
1800 City Federal Building
Birmingham, Alabama 35203
(205) 254-3224

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MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,

Appellees.

AMICUS BRIEF OF ALABAMA TRIAL LAWYERS ASSOCIATION IN OPPOSITION TO APPELLANT AETNA LIFE INSURANCE CO.

STATEMENT OF THE CASE

The members of the Alabama Trial Lawyers Association represent numerous citizens of the State of Alabama who have been injured or damaged by the wrongful conduct of others. In many instances the continuation of the

citizens basic enjoyment of life depends wholly upon due process being afforded them by the Alabama courts.

The precedent which the petitioners seek to establish regarding recusal has serious consequences to our judicial system and the due process rights of the citizens of Alabama. These issues deserve to be addressed fully by all interested parties.

STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The statement of issues and statement of the case presented by the Lavoies in brief are adopted. This brief addresses only the disqualification issue, i.e., whether the Justices of the Alabama Supreme Court were required to recuse themselves when no one of the Justices had any interests, direct or incidental, in this case.

ARGUMENT

A. The Historical Basis For Disqualification of Judges.

No man shall be a judge in his own case.[1]

Although judicial disqualification finds its origins in the early days of recorded history, legal scholars of all ages have disagreed about its scope. At early common

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[1]Co. Litt*141a

law, a judge was required to recuse himself only when he had a direct pecuniary interest in the subject matter of the litigation. Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 611-12 (1947). Thus, a judge was disqualified because he received the fine which he had the power to inflict, *Dr. Bonhams Case,* 77 Eng. Rep. 638 (K.B. 1608); and also when a judge sat in an ejectment case in which he was the lessor of the plaintiff, *Anonymous,* 91 Eng. Rep. 343 (K. B. 1698). Bracton's view that mere suspicion was a basis for disqualification[2] was not accepted.[3]

Obviously, the common law basis for disqualification was insufficient to guaranty justice to litigants in the variety of situations wherein a judge might have an interest not of a strictly pecuniary nature. Notwithstanding the common law over-idealization of a judge's capacity for impartiality, nineteenth-century English courts recognized that when a judge had a substantial interest in the outcome of the litigation, whether pecuniary or otherwise, disqualification was in order. *The Queen v. Meyer,* 1 Q.B.D. 173 (1875).

B. American Practice On The Issue Of Disqualification Of Judges.

American experience has wisely broadened disqualification practice to include many situations where a judge's interest in a case is other than pecuniary. There are three general categories of cases where a judge's dis-

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[2]4 Bracton, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (Woodbine's ed. 1942) 281.

[3]3 W. BLACKSTONE, COMMENTARIES *361.

Grimshaw v. Ford Motor Company, 119 Cal.App.3d 757 (1981) [Manufacturer refused to recall defective gas tanks on Pintos — cheaper to pay death claims than to correct the defect. (Ford calculated that it was cheaper to let people die than to make an $11.00 repair).]; *Vossler v. Richards Manufacturing Company*, 143 Cal.App.3d 952 (1983) [Medical implant defect concealed by manufacturer to maintain "share of market" — patients require second surgery after breakdown of implant.]; *Tibbs v. Great American Insurance Company*, 775 F.2d 1370 (9th Cir. 1984) [Refusal to investigate insurance claim or provide legal defense, company's response to judge's advice to provide legal defense — "F__ the Judge" and "no court of law is going to tell us what to do."]; *Taylor v. Superior Court*, 24 Cal.3d 890 (1979) [Punitive damages recoverable for injuries imposed by drunk driver — drunk driving not considered "mere negligence."]; *Nolin v. National Convenience Stores, Inc.*, 95 Cal.App.3d 279 (1979) [Refusal to perform maintenance and subsequent negligence — company's position "We have a team of lawyers that would tie it up in court for years."]

It could even be said that the position of appellant/*amici* in this action is that they want to know how expensive it's going to be to commit outrageous acts so that they can build certainty into their long-range financial planning. One of the most important purposes of punitive damages is to make wrongful conduct less cost effective and deny tortfeasors the certain profit for which they strive. The one certainty that can be gained from the *amici* presentation of statistics is that there is a great deal of tortious and unconscionable conduct which is being exposed and deterred. The fact appellants and their *amici* are seeking the present requested relief tends to document the fact that the therapeutic value of these verdicts is starting to take effect.

The uniqueness of appellants/*amici's* position relative to punitive damages in turn begs the question, if more criminals are convicted and punished this year, should we increase the prosecutor's burden and afford the defendants greater protection next year? Defendants faced with a potential punitive dilemma have two adequate remedies: (1) employ the current defenses and civil procedures available to them, or (2) abandon the wrongful malicious conduct which they have exhibited in a wide variety of cases.

A. PUNITIVE DAMAGES DO NOT CONSTITUTE A CRIMINAL PENALTY.

Appellants and *amici*, on behalf of appellants, argue that punitive damages are the functional equivalent of criminal penalties, and, therefore, defendants should be afforded heightened due process safeguards and the protection afforded by the Excessive Fines Clause of the Eighth Amendment. It is significant to note, appellant and *amici* on behalf of appellant cite not a single case which supports this position. Cases cited are not even remotely in point and their arguments ignore, as if they do not exist or stand, the landmark precedents on the questions of the constitutionality of punitive damages.

The concept of punitive damages, and the jury's power to assess such damages, has been part of the law since as early as 1763. *Huckle v. Money*, (2 Wils., K.B. 205) declared:

> The personal injury done to the [plaintiff] . . . was very small, so that if the jury had been confined by their oath. . . perhaps [20 pounds] damages would have been thought damages sufficient; but the small injury done to the plaintiff. . . did not appear to the jury in that striking light which the

> great point of law, touching the liberty of the subject, appeared to them at the trial . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishmen would wish to live an hour; it was a most daring public attack upon the liberty of the subjects.

The *Huckle* reasoning, an expression of "societal disapproval," has become the basis for our concept of punitive damages. In 1851, this court upheld the reasoning of *Huckle*, the propriety of punitive damages and the jury's power to award such damages. *Day v. Woodworth*, 54 U.S. (13 HOW.) 363, 370-371 (1851).

More recently, in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 159 (1967), this Court readdressed the constitutionality of punitive damages finding that "the Constitution presents no general bar to the assessment of punitive damages in a civil case."

Although the label "punitive" has criminal connotations, it has long been recognized that such damages are civil and exemplary in nature, customarily imposed as a civil sanction. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). These exemplary damage matters have traditionally been administered by the civil rather than the criminal branch of the courts, and have been subject to all the requirements of due process of law. To characterize exemplary damages as criminal fines is contrary to the fact as well as the state's legislative intent, where legislation has provided the foundational basis for punitive damages.

Appellants seem to base their characterization of punitive damages on an erroneous conclusion that because punitive

damages act as punishment, as do criminal penalties, then they too must conclusively be characterized as criminal in nature.

Punitive damages may act as a form of punishment, however, this is but one of the multiple functions which they serve. All civil fines or penalties which act to punish are not penal. See *Ingraham v. Wright*, 430 U.S. 651, 670 n. 39 (1977); *Gertz v. Welch*, 418 U.S. at 350; *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 460 (1977). In fact, if a civil sanction serves a broader remedial goal, which is to protect important societal interests, the sanction cannot be characterized as criminal. See *Helvering v. Mitchell*, 303 U.S. 391, 399-401 (1938).

In *Helvering*, the Court found that a tax penalty assessed against a defendant for tax fraud was not criminal because the statute was considered *remedial* in character. The penalty was considered remedial because its purpose was preventative, to safeguard the revenue, as well as reparative, to reimburse the government. *Id.* at 401.

If, however, a law's primary purpose is "retribution," absent any societal benefit, then the law can be considered criminal in character. *Kennedy v. Mendoza - Martinez*, 372 U.S. 144, 182 (1963). In *Kennedy*, the Court held that stripping an American of his citizenship for draft evasion was a form of criminal punishment. In reaching this conclusion the Court examined the intent of the Legislature in passing the statute. The Court concluded that the intent was primarily retributive in nature. The statute did not serve any other goals, such as promoting societal good, military morale, or the conduct of the war generally. *Id.* at 182. Thus, absent these other broader goals, the Court found the statute to be criminal.

Similarly, in *Curtis*, 388 U.S. at 167, this Court in upholding the constitutionality of punitive damages, analyzed the remedial function of such damages. Chief Justice Harlan noted that when punitive damages serve a wholly legitimate purpose of protecting an individual's reputation, misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive damage award.

These cases demonstrate that when a law serves a legitimate governmental goal, even if a fine or sanction is imposed as a means of achieving that goal, the law should not be characterized as penal.

Punitive damages have long served a multiplicity of important societal goals, including general deterrence, regulation, and reformation.

As this Court recognized in *San Diego Union v. Garmon*, 359 U.S. 236, 247 (1959):

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Punitive damages have, in fact, acted as a successful and vital means of regulating and reforming undesirable conduct. The punitive damage award has acquired the "characteristics of a strong, silent, consumer public advocate. . . . This essential and crucial body of common law, marked by relative simplicity, is playing an increasingly significant role in protecting contemporary society from many non-regulated or inadequately regulated businesses and industries." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in*

Insurance Bad Faith Actions. 13 U.S.F.L. Rev. 613, 615 (1979).

A review of the response of the insurance industry reflects the important regulatory and reformatory function of punitive damages awards. The response of the industry is best reflected by the observation that "[t]he specter of recent punitive damage awards against insurance companies, most of which have occurred in California, is awesome. They have resulted in a shock wave throughout the insurance industry which is not measurable on the Richter Scale." Kornblum & Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 Best's Rev. 36, 44 (1976).

As a result of these verdicts, insurers who were being inadequately regulated by administrative agencies, are now being regulated and the conduct of the entire insurance industry is being reformed to conform to the reasonable interests and expectations of the public.[1]

Punitive damages are serving a similar function in the manufacturing industry. In this area, punitive damages have acted to regulate and reform reprehensible conduct with the goal and effect of making products safer for individuals and the consuming society. See Owens, *The Doctrine of Punitive Damages*, 74 Mich. L.Rev. 1257, 1282-1287 (1976).

Certainly the functions being served in both the insurance and manufacturing industries are legitimate and worthy goals satisfying basic contemporary needs of our society. These are but two of many examples where punitive damages are serving a broad therapeutic function of

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[1] See Levine, *supra*, at 621-627, for a comprehensive review and analysis of the insurance industry's response to punitive damage awards.

regulating and reforming conduct, independent of any form of punishment.

Moreover, it is significant to note, these societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society. "Comparing the regulatory function of punitive damages verdicts to the function of 'regulatory' agencies reflects the effective simplicity of exemplary damages rules of law administered by judges and jurors and the ineffective complexity in the maize of administrative agencies and regulations. Paradoxically, from an economic perspective, the cost of regulation through a punitive damage sanction is borne by the insurer acting wrongfully and not by taxpayers supporting an ineffective administrative agency." Levine, *supra*, at 627 (1979).

In contrast, the cost of protecting society through the use of a criminal penalty is borne by society, which demonstrates another significant distinction between criminal penalties and civil sanctions.

In addition to the important goals of reformation and regulation, punitive damages serve a compensatory function which is unrelated to any form of punishment. In many instances punitive damages serve to reimburse the plaintiff for losses which are not ordinarily recoverable as compensatory damages. These might be actual losses plaintiff is unable to prove or for which the rules of damages do not provide relief, including the legal fees and expenses of bringing a lawsuit. Owens, *supra*, at 1295; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158, 1163 (1966).[2]

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[2] For example, in *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So.

An additional distinguishing characteristic of a criminal penalty, as opposed to a civil sanction, is the stigma which is implied in a criminal violation. This Court has indicated that the possibility of stigma, resulting from a state's imposition of a criminal penalty, is an important factor in determining whether a statute should be afforded heightened procedural due process. *In re Winship*, 397 U.S. 358, 363 (1970). The fact a defendant would be "stigmatized by conviction" or the probability that a defendant might lose his "good name" has been found to play a primary role in this Court's determination that a greater level of procedural protection is required. *Id*, 363, 364.

Clearly, the stigma implied in a punitive damage award does not rise, if it exists at all, to the level which it does in a criminal action. A defendant in a punitive action certainly does not lose his "good name," his right to vote, hold public office, or even do business with governmental agencies, as a result of a punitive award, as does an individual convicted of a crime.

In addition, most criminal defendants face consequences which no punitive damage defendants face. For example, most crimes are punishable by imprisonment, a threat never faced by punitive damage defendants. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 283-284 (1983). The following have also been articulated as characteristics distinguishing between punitive and criminal sanctions:

> "In addition a prior punitive damages award, unlike a criminal conviction, cannot be used to impeach a person when he testifies in a subsequent

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2d 916, 925 (Ala. 1981) the Alabama Supreme Court recognized that punitive damages "may include mental distress and economic loss."

> trial. Convicted felons may forfeit various civil rights, but punitive damages awards produce no such result. Lawyers can be disbarred from conviction of any of several crimes, but not for an adverse punitive damages judgment. Employers commonly ask whether an applicant has been convicted of a crime, but they do not ask whether punitive damages have been assessed against the applicant. *Id.* at 283-284.

Finally, the civil nature of punitive damages becomes even more clear in light of the fact punitive damages have historically been considered a part of a state's tort law. *Silkwood v. Kerr-McGee*, 104 S.Ct. 615, 625 (1984). In *Silkwood*, this Court ruled on the propriety of a state's punitive damages law, in the analagous context of preemption, finding that a state's punitive damage law should be allowed to apply unless expressly supplanted by federal law.

The State of Alabama, as well as many other states, have pronounced their belief that punitive or exemplary damages are in the public interest. In doing so, they exercise their powers under the Tenth Amendment of the Constitution. Thus, the effect of the appellant's arguments, rather than to prevent constitutional violation, would be to constitute a totally unprecedented and unwarranted interference with states' rights:

Amendment X

> The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.

B. PUNITIVE DAMAGES DEFENDANTS NEED NOT BE AFFORDED ANY HEIGHTENED PROCEDURAL PROTECTIONS

As demonstrated, and contrary to the mischaracterizations of appellants and *amici*, punitive damages are civil and not criminal in nature. Therefore, the procedural due process safeguards afforded in a criminal case are inapplicable. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 716 (1967); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1173 (1981), *cert. den.* 464 U.S. 824 (1983); *Palmer v. A. H. Robbins Company*, 684 P.2d 187, 216-217 (Colo. 1984).

In fact, plaintiffs seeking punitive damages should not be subject to any different constitutional standards than those afforded when awarding compensatory damages. *Curtis Publishing Company v. Butts*, 388 U.S. 130, 160 (1967).

C. EXISTING STATE LAW PROVIDES ADEQUATE DUE PROCESS

Appellants argue that punitive damages cannot be imposed without "fair warning that such damages might be imposed" and in the absence of "articulated substantantive rules of conduct" by which a party can avoid such liability. In addition, appellants and *amici*, in support of appellants, contend there are no meaningful standards for governing the amount of a punitive damage penalty, and, therefore, punitive damages are vague and in violation of the Due Process Clause of the Constitution.

Certainly both individual and corporate defendants are cognizant that their outrageous or reprehensible conduct

will subject them to punitive damages, and, further, that the more egregiously they act in a given situation, the larger the likely punitive damages award will be. Corporate defendants, in particular, are fully aware of the types of actions which will subject them to punitive damage liability.

This awareness is amply demonstrated by the concerted acts of the thirteen associations who have filed the six *amici curiae* briefs in support of appellant in the instant action. Clearly, if appellants and these other organizations were not fully aware of the likely consequences of their wrongful acts, there would not be the concern over the instant action.

Although punitive damages have been attacked through the years as void for vagueness, this Court as well as other courts have uniformly rejected such challenges. *Smith v. Wade*, 461 U.S. 30, 49-51 (1983); *Maheu v. Hughes Tool Company*, 569 F.2d 459 (9th Cir. 1977); *Egan v. Mutual of Omaha Insurance Company*, 24 Cal.3d 809 (1979), *cert.* den., 445 U.S. 912 (1980); *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689 (1967); *Fletcher v. Western National*, 10 Cal.App.3d 376 (1970).

In *Smith v. Wade*, 461 U.S. at 56, this Court addressed the issue of whether punitive damages standards were constitutionally too vague, holding that the "recklessness" standard is not too "vague" for a jury to apply in assessing punitive damages. Further, the Court stressed that the focus should be on the defendant's conduct, concluding that if defendant's conduct warranted punitive damages, then it was "appropriate to allow a jury to assess punitive damages." *Id.* at 54. Thus, the *Smith* court not only upheld the standards for assessing punitive damages, but also upheld the right of the jury to *assess* punitive damages. See *Day v. Woodworth*, 54 U.S. (13 HOW.) 362, 371 (1851).

Adequate standards currently exist for both the imposition of punitive damages, as well as the jury's assessment of the specific amount. In this regard, it is important to initially analyze the type of conduct which gives rise to a punitive damage award. Punitive damages are only awarded after a plaintiff has demonstrated that an injury has resulted from the "conscious wrongdoing" of a defendant. *McCormick on Damages*, 280 (West, 1935). Thus, as explained in the *Restatement of The Law of Torts Second*, (1977):

> [T]hese damages can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of *outrage* similar to that usually found in crime. The conduct must be *outrageous*, either because the defendant's acts are done with *evil motive*, or because they are done with *reckless indifference* to the rights of others. . . . Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages [Section 908, Comment B]. (emphasis added)

See *Smith v. Wade*, 461 U.S. 30, 46-47 (1983) (emphasis added); see California Civil Code § 3294.

Further, the amount of a punitive damage award is generally determined by the jury upon consideration of three criteria: (l) the reprehensibility of defendant's misconduct; (2) a reasonable relationship between the harm caused by the tortfeasor and the quantum of exemplary damage awards; and (3) the wealth of the defendant. See Restatement (Second) of Torts Section 908(2) (1973); *Neal v.*

Farmers Insurance Exchange, 21 Cal.3d 910, 928 (1978); see California Civil Code § 3294.

Appellants and *amici*, on behalf of appellants, contend such standards are "too vague" and "imprecise." Thus, it appears they are asking this Court to find that a state's punitive damages laws must define with some sort of specificity the exact amount or maximum limit of any punitive damage award, in any given action. This argument is erroneous for many reasons. First, as discussed previously, the constitutionality of a jury's power to assess the amount of punitive damages, even absent specific standards, has long been upheld. Moreover, such specific standards for assessment would be virtually impossible to create. Punitive damages serve differing goals of deterrence, regulation, reformation, compensation, and punishment. Thus, to effectively serve these goals, each punitive damage award must be assessed by a jury after carefully weighing the harm caused, the wrongful conduct, and the wealth of the wrongdoer, in light of these general goals.

The guidelines for determining the scope of a punitive damage award cannot be so specific, nor can they be "approached from a jurisprudential perspective divorced from the admonitory function of such verdict; rather [they] should be designed to preserve and strengthen the social desirability of landmark bad faith decisions and exemplary verdicts." Levine, *supra*, at 633. Thus, it would be impossible for a lawmaking body, who has not heard or seen all of the evidence in a particular case, to create a specific standard or set maximum limits on punitive awards which would be fairly applied in an individual case.

What lawmaker could predict the myriad types of "outrageous" misconduct of an individual or corporate

defendant, or the appropriate amount of damages which would act to regulate, punish, and deter that type of conduct? In fact, if a court was required to apply maximum or statutory limits on punitive damages, it is likely that such limits would totally undermine the goals and effects of punitive damages.

Admittedly, the use of statutory maximums or set standards would enable potential defendants to more accurately estimate the internalized costs of their misconduct. In essence, it would allow defendants to evaluate whether, in a particular situation, it would be more cost effective to act "outrageously" or to act within the law. Thus, if as a result of weighing the costs a defendant concluded that the penalty would be more cost effective to bear, a defendant could chose to flagrantly disregard the law and yet, in essence, go unpunished and unregulated. This manifestation of cost analysis phenomena in relation to human life and safety is best reflected in the case of *Grimshaw v. Ford Motor Company*, 119 Cal.App.3d 757 (1981). In *Grimshaw*, the defendant made a calculated financial decision not to recall a deadly defective automobile because the estimated cost to repair would have been $137,000,000.00 versus the $50,000,000.00 estimated cost of paying the injury claims resulting from the defect. (This estimate included the cost of paying claims resulting from the death of the vehicle occupants.) Thus, as this case and others like it demonstrate, in order to preserve the deterrent and regulatory function of punitive damages, it is necessary to leave the power to assess these awards with the jury as it has traditionally been left.

Although the assessment of punitive damage awards is within the jury's discretion, aggressive judicial control over these awards acts as an added procedural safeguard. As

damage award in this case is "excessive" in the constitutional (and common-sense) meaning of that word.

Appellees' excoriation of appellant (and the insurance industry generally), Br., at 40-42, does not aid them in their defense of the constitutionality of this $3,500,000 award. Appellees rely, Br., at 1, on what they term "detailed findings of fact" which were authored by the very Justice of the court below whose objectivity has been drawn into question in this case. Justice Embry, of course, described "dark shadows of fraud and conspiracy," lawlessness and lying throughout his opinion, but he is hardly a neutral source. *See* note 10, *supra.*

Appellees also argue, Br., at 41-42, that an enormous "punitive damage award mitigates the financial incentive which an insurance company has to engage in unreasonable claims practices . . . ." However, appellees depart from the record to make this argument, because there was no proof at trial that the partial denial of appellees' claim was predicated on any financial benefit to appellant. Indeed, the evidence in the record suggests a contrary conclusion.[18]

While appellant may not challenge here the jury's finding that it acted in "bad faith" as a matter of state law,

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[18] The contract of insurance involved in this case was an "experience rated" policy pursuant to which premiums were subject to adjustment upward or downward by appellant based on claims experience under the policy. J.A. 46-48. Such an "experience rated" contract is designed to deal "equitably with large policyholders" by ensuring that premiums are based upon actual claims experience of a policyhloder. Seery, "Types of Health Risk Bearers: Insurance Companies," in *Group Insurance Handbook* 233 (R. Eilers & R. Crowe eds. 1965). As claims paid by an insurance company rise, so do premiums. *Id.* As a matter of common sense, an experience rated policy has the tendency to remove any incentive to engage in the kind of systematic denial of "many valid insurance claims" which appellees, Br., at 42, insinuate to have happened in this case. Indeed, as has been observed, under an experience-rated system insurers have little incentive to control costs of claims believed to be excessive because claims are paid out of the insured's money. A. Enthoven, *Health Plan: The Only Practical Solution to the Soaring Cost of Medical Care* 25-27 (1980).

it is appropriate to point out that this case involves the 23-day hospitalization of a patient whose symptoms her own physician could not substantiate and which he described as having a psychogenic overlay. J.S. App. 4a, 470 So.2d, at 1062. Two experts attested at trial to the reasonableness of appellant's partial denial of the claim under these circumstances. J.S. App. 25a, 470 So.2d, at 1072. Indeed, the conduct for which appellant has been assessed a $3,500,000 fine was conduct which was *not* company policy. J.S. App. 21a, 470 So.2d at 1070. Rather, even as viewed by Justice Embry, it reflected a failure to follow company policy.

Appellees' argument, Br., at 46-49, that the award of punitive damages here should be sustained notwithstanding the fact that the tort of bad faith was not even recognized by Alabama until 1981 is frivolous. Under appellees' submission, appellant should apparently have been on notice of its potential liability in this case on the basis of, *inter alia*, the decision of the Supreme Court of California in *Gruenberg* v. *Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal. Rptr. 480 (1973).[19] But it is the law of Alabama, enacted by judicial fiat four years after appellant's conduct occurred, under which a grossly excessive fine has been imposed which neither in fact nor theory advances any significant state interest. The law of Alabama in 1977 was clear. There was no tort of bad faith failure to pay an insurance claim. Indeed, in 1976 the court below had ordered a complaint, the allegations of which are indistinguishable from the allegations of the complaint in this case, to be dismissed for failure to state a claim on which relief could be granted. *Old Southern Life Insurance Co.* v. *Woodall*, 295 Ala. 235, 243, 326 So.2d 722, 732 (1976).[20]

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[19] Appellees' statement, Br., at 48, that "Appellant itself was a defendant in *Gruenberg* v. *Aetna Insurance Co.*," is both legally irrelevant and, like other assertions of appellees, *see* notes 8 & 9, *supra*, factually incorrect. *Moody's Bank & Finance Manual* 2610-14, 2804 (1973).

[20] Appellees' attempt, Br., at 46, to rely on *Old Southern* is unjustified. In that case, the Court below ordered the pertinent claim for relief to be

Finally, appellees argue, Br., at 46, that severe punishment administered for conduct which had not been declared to be actionable at the time engaged in is an appropriate and effective deterrent to similar conduct in the future. This argument is erroneous, because deterrence operates prospectively. As pointed out by this Court in *Smith* v. *Wade*, 461 U.S. 30, 50 (1983), the deterrent effect of punitive damages is realized if persons wanting to "avoid lawsuits [may] look to the standard of accountability" in order to guide their conduct. There was, in Alabama, no "standard of accountability" of any kind until 1981 when the court below recognized, for the first time, the possibility of recovery of punitive damages for bad faith failure to pay an insurance claim. As this Court has stated, "we cannot regard as blameworthy those parties who conform their conduct to the prevailing . . . norm." *United States* v. *Peltier*, 422 U.S. 531, 542 (1975). The change in Alabama law wrought by the recognition in 1981 of the tort of bad faith clearly " 'constitut[ed] a sharp break in the line of earlier authority,' " *id.*, at 544, (Brennan, J., dissenting), *quoting Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968); this renders frivolous any argument that the punitive damages award in this case could possibly have achieved any measurable deterrent effect.

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dismissed because it "simply charges that the company committed a tort in maliciously and fraudulently refusing to pay a claim under the policy." *Old Southern Life Insurance Co.* v. *Woodall*, 295 Ala. 235, 243, 362 So.2d 726, 732 (1976).

Respectfully submitted,

*Theodore B. Olson
John J. Swenson
Larry L. Simms
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

Of Counsel:

Peter V. Sintz
William M. Cunningham, Jr.
Sintz, Campbell, Duke, Taylor & Cunningham
3763 Professional Parkway
Mobile, Alabama 36609
(205) 344-7241

**Counsel of Record*

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APPENDIX

APPENDIX

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 20

ASSIGNMENT OF ERROR NOT REQUIRED

Assignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient.

Committee Comments

Rule 20 states in positive terms that assignments of error are no longer required. While perhaps unnecessary, inclusion of this statement emphasizes the spirit in which these rules are intended to operate: to reach the merits of litigation.

RULE 40

APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)—or in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)—after the filing of the original application and brief. No second application for rehearing will be considered unless

the rehearing reversed or substantially modified the original opinion of the court.

(Amended eff. April 1, 1984.)

Committee Comments

This rule is based upon former Supreme Court Rule 17, with certain modifications. References to "terms of court" have been eliminated inasmuch as the court no longer is concerned with such terms.

The rule specifically provides that an applicant for rehearing must file a new brief, and prohibits an application for rehearing by any party who did not submit an original brief. This would ordinarily have application only to an appellee in civil cases, or to both parties in criminal cases.

No answer to an application is permitted in the sense of a pleading. Reply briefs may be filed.

The rule provides for service of the application for rehearing and the accompanying brief in accordance with the general provisions of service in these rules. The former requirement that the application and brief must be physically delivered to the office of the opposing counsel within the former 15-day period is no longer required by this rule.

The rule makes explicit the prohibition against two applications for rehearing by the same party. This would not operate to prevent a party who prevailed in the initial decision and lost on the rehearing from asking for a second rehearing.

It is contemplated that execution of the judgment will be suspended routinely by the court in accordance with this rule.

For a discussion of the minimum standards which a brief in support of an application for rehearing must meet in order to be adequate, see DeGraaf v. State, 34 Ala. App. 137, 37 So.2d 130. See also Rules 31 and 32 for the standards

which briefs in general must meet with respect to form and number. It will be permissible hereunder to combine the application for rehearing and the brief in support thereof.

RULE 44

CONSTITUTIONAL QUESTIONS

(a) *Service.* If the validity of any statute, executive or administrative order, municipal ordinance, franchise or written directive of any governmental officer, agent or body is raised in the appellate court, and the State, municipal corporation or governmental body which enacted or promulgated such questioned order is not a party to the proceeding, the party raising such question shall serve a copy of his written brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or the chief legal officer of the governmental body whose order is questioned.

(b) *Certificate of Service.* A certificate of service shall be included in the brief of the party raising such question.

(c) *Right to Respond.* The State, municipal corporation, or governmental body shall, within the time allowed for the filing of a response to the brief, be entitled to be heard orally or on brief or both.

(d) *Notice.* Except by special order of the court, in the absence of such notice and certificate, the appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court.

Committee Comments

Rule 44 carries forward the existing requirement that an affected governmental body or the Attorney General as the case may be shall be given notice when the validity of

a statute, ordinance, etc., is drawn in question by a party on an appeal. However, the failure to give notice to such governmental body or to the Attorney General is not fatal, but is an omission which may be supplied in accordance with subdivision (d). Such notice will necessarily occasion a delay to the party raising the question, which is appropriate inasmuch as it is his fault. However, subdivision (d) permits the action to proceed in a case without such notice by special order of the court if the court feels it is urgent or necessary. No time is set by subdivision (d) for the response of the Attorney General or other legal officer as this would be handled on a case by case basis or by order of the court covering this class of cases.

The appearance of the chief legal officer, etc., when the governmental body is not a party to the lawsuit would ordinarily be in accordance with the provisions for briefs of an amicus curiae. There is no requirement that the governmental body respond or enter the case at all if it does not wish to do so. The court may, however, under Rule 29 dealing with briefs of an amicus curiae, request a brief from the governmental body affected.

The term "validity" is intended to be broad enough to encompass the method of enactment as well as form and substance of any ordinance, regulation, state, etc.

The rule has no application when the governmental body is already a party to the litigation. The rule is also broad enough to include not only appeals, but also any extraordinary proceeding before the court. Rule 29 is broadened in this instance to permit oral argument by the affected body whereas oral argument is not ordinarily likely in the event of an ordinary amicus curiae brief.

The provision of subdivision (d) for special order of the court to proceed without notice is not only for emergency situations but also for those instances in which the statute, ordinance, etc., is patently invalid and the court sees no point in requiring briefs from the affected body.